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This issue contains:

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86–750)

PAGODA TRADING CORP., APPELLEE *v.* UNITED STATES, APPELLANT

Saul Davis, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellant. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Leonard Rosenberg, Sandler & Travis, of Miami, Florida, argued for appellee.

Appealed from: U.S. Court of International Trade
Judge RESTANI.

(Appeal No. 86–750)

PAGODA TRADING CORP., APPELLEE *v.* UNITED STATES, APPELLANT

(Decided November 3, 1986)

Before FRIEDMAN, SMITH, and BISSELL, *Circuit Judges.*

SMITH, *Circuit Judge.*

The August 27, 1985, judgment of the United States Court of International Trade,[1] holding that certain merchandise imported by Pagoda Trading Corporation (Pagoda) was "deemed liquidated" 1 year after entry into the United States, if affirmed.

ISSUES

The two issues are:

1. Whether the Court of International Trade erred in holding that Pagoda's protest was sufficient to establish jurisdiction for the court to decide the "deemed liquidation" issue, and
2. Whether the Court of International Trade erred in finding that there was no valid basis for suspension of liquidation, that no extension of liquidation was effected, and that Pagoda's entries were deemed liquidated at the rate of duty, value, and amount of duties asserted by Pagoda at the time of entry.

[1] *Pagoda Trading Co. v. United States*, 617 F. Supp. 96 (Ct. Int'l Trade 1985).

BACKGROUND

Pagoda is an importer of Korean footwear, including moon boots and snowmobile boots. This case involves the computation of the duty on Pagoda's imported merchandise.

The final computation of the duty on imported merchandise is known as "liquidation."[2] Generally, merchandise must be liquidated within 1 year after entry into the United States or else it "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer."[3] The Secretary of the Treasury may extend the 1-year period for liquidation by giving notice of "extension" to the importer for certain reasons including "suspension" of liquidation "as required by statute or court order."[4]

In the present case, the liquidation of Korean footwear was suspended from April 7, 1980, to March 18, 1981, pursuant to the order of the Department of Commerce (Commerce) (based on an earlier countervailing duty order). On five occasions between August 5, 1980, and September 9, 1980, Pagoda entered Korean footwear into the United States, and liquidation was suspended pursuant to the April 7, 1980, Commerce order.

On March 17, 1981, the relevant countervailing duty order was revoked. On March 18, 1981, Commerce notified the United States Customs Service (Customs) to proceed with liquidation of Korean footwear. Notwithstanding the directive to proceed with liquidation, during July and August 1981 Customs sent Pagoda computer-generated notices that liquidation was suspended for at least four of the five entries.

The Court of International Trade held that there was no basis for the computer-generated notices and, thus, the notices were not valid to suspend liquidation. The court also held that the notices of "suspension" were not effective to serve as notices of "extension" of the period for liquidation under 19 U.S.C. § 1504 (1982).

Section 1504 allows only 1 year from the date of entry for liquidation to occur, subject to valid extensions of that period. If the merchandise is not liquidated within 1 year, it "shall be deemed liquidated at the rate of duty * * * asserted at the time of entry by the importer."[5] Thus, the Court of International Trade held that the entries made by Pagoda from August 5, 1980, to September 9, 1980, were deemed liquidated by operation of law 1 year after the entries were made.

Without regard for the "deemed liquidation," on February 26, 1982, Customs stated that it was liquidating all five Pagoda entries using American Selling Price appraisement, resulting in a duty higher than that asserted at the time of entry by Pagoda. On May

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[2] 19 C.F.R. § 159.1 (1985).
[3] 19 U.S.C. § 1504(a) (1982).
[4] 19 U.S.C. § 1504(b) (1982).
[5] 19 U.S.C. § 1504(a) (1982).

24, 1982, Pagoda submitted a protest challenging the appraisement and classification of the merchandise. On June 18, 1982, Pagoda filed a supplement to the protest, asserting that the February 26, 1982, liquidation was invalid because of the earlier "deemed liquidation." On July 29, 1982, the protest was denied. Pagoda brought an action in the Court of International Trade contesting the denial of the protest.

The Court of International Trade asserted jurisdiction under 28 U.S.C. § 1581(a) (1982). The court entered summary judgment in favor of Pagoda, holding that the "deemed liquidation" occurred by operation of law prior to the February 26, 1982, liquidation asserted by Customs. The Government appeals. Jurisdiction of the United States Court of Appeals for the Federal Circuit is based on 28 U.S.C. § 1295(a)(5) (1982).

ANALYSIS

A. *Jurisdiction of the Court of International Trade.*

The Court of International Trade has jurisdiction under 28 U.S.C. § 1581(a) (1982) over a civil action to contest the denial of a protest under 19 U.S.C. §§ 1514, 1515 (1982). Pagoda's May 24, 1982, protest was timely filed within 90 days of the February 26, 1982, liquidation asserted by Customs. The May 24, 1982, protest was based on two grounds of objection under 19 U.S.C. § 1514(a):

> (1) the appraised value of the merchandise; [and]
> (2) the classification and rate and amount of duties chargeable[.]

On June 18, 1982, Pagoda filed a supplement to the protest asserting that a "deemed liquidation" had occurred 1 year after each entry, and that Customs' classification and appraisement, as effected by the February 26, 1982, liquidation, were invalid. The trial court found that Pagoda filed the supplement shortly after the time for filing a protest had expired, but prior to disposition of the protest as required by section 1514.

In asserting the "deemed liquidation" issue, the supplement raised a "new ground" of objection under the following category of 19 U.S.C. § 1514(a):

> (5) the liquidation or reliquidation of an entry, or any modification thereof[.]

In *Old Republic Insurance Co.* v. *United States*,[6] the importer protested the duties resulting from a liquidation and later filed a supplement alleging that liquidation was improper because of Customs' failure to send a notice of extension of liquidation. The Court of International Trade held that the supplement was permissible because (1) the original protest was sufficient to advise Customs that the liquidation was being protested and (2) new grounds may be

[6] *Old Republic Ins. Co.* v. *United States*, 8 Ct. Int'l Trade 1 (1984).

presented in support of objections raised by a protest at any time prior to the disposition of the protest.[7]

Here, the trial court found that Pagoda's supplement (raising the new ground of deemed liquidation) was timely because it related to the original protest of the classification and appraisement decisions and because the new ground was raised "prior to the disposition of the protest."[8] The Government has failed to show that the court's findings were clearly erroneous or that the court erred as a matter of law.[9]

The trial court also was correct in holding that the supplement filed by Pagoda challenged the same "decisions" as those challenged in the original protest. Since the supplement did not challenge a different "decision," but merely raised a "new ground" in support of the objections in the original protest, the supplement did not have to be filed within the 90-day period after the February 26, 1982, liquidation asserted by Customs.[10]

The present case is distinguishable from *Computime, Inc.* v. *United States,*[11] involving entries of watches composed of a watch module and case attached to a watchband. Computime filed a timely protest on the classification of the watch modules only. *After* Customs rendered a favorable decision on the first protest, Computime then filed a second protest on the classification of the watchband. The Federal Circuit held that the second protest was impermissible because a decision already had been rendered on a protest involving a separate item in the same entry.

Here, Pagoda was permitted to file the supplement raising "[n]ew grounds in support of objections raised by a valid protest * * * at any time *prior to the disposition of the protest.*"[12] (Emphasis supplied.) Pagoda's supplement related to the original protest in that it objected to the same classification and appraisement decisions effected by the February 26, 1982, liquidation asserted by Customs. The trial court found that the supplement was timely filed with Customs prior to the disposition of the protest, and the Government has failed to show clear error in this finding.

The "deemed liquidation" issue was properly and timely raised before Customs during the section 1514 protest and the section 1515 review. Therefore, the Court of International Trade correctly exercised jurisdiction to decide the "deemed liquidation" issue in the ensuing civil action contesting the denial of the protest.[13]

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[7] "* * * New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title at any time prior to the disposition of the protest in accordance with that section. * * *" 19 U.S.C. § 1514(c)(1) (1982).

[8] *Id.*

[9] FED. R. CIV. P. 52(a); *Daw Indus., Inc.* v. *United States,* 714 F.2d 1140, 1142, 1 Fed. Cir. (T) 146, 148 (1983).

[10] *Cf.* 19 U.S.C. § 1514(c)(1) (1982):

"* * * A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. * * *"

[11] *Computime, Inc.* v. *United States,* 772 F.2d 874 (Fed. Cir. 1985).

[12] 19 U.S.C. § 1514(c)(1) (1982).

[13] 28 U.S.C. § 1581(a) (1982).

B. *Deemed Liquidation.*

Section 1504 of 19 U.S.C. sets a limit of 1 year for liquidation (final computation of duty) of imported merchandise. The 1-year period may be extended "by giving notice of such extension to the importer" for any of the following reasons:[14]

> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
> (2) liquidation is suspended as required by statute or court order; or
> (3) the importer, consignee, or his agent requests such extension and shows good cause therefor.

Here, Customs sent computer-generated notices of "suspension" to Pagoda in July and August 1981. The Government concedes that it does not know why these notices were sent, stating only that the computer previously had been programmed to send the notices automatically. The trial court correctly held that there was no valid basis for suspension of liquidation "as required by statute or court order,"[15] since the countervailing duty order had been revoked and Customs had been directed to *proceed* with liquidation several months before the notices of suspension were sent.

The Government argues that the notices of "suspension" should be considered notices of "extension," as authorized by the broader three categories of section 1504(b), and that the use of incorrect terminology was harmless error. The trial court, however, held that "[n]o such notice of an extension was given to plaintiff in this case."[16] The court found that there was no evidence that any authorized official had granted an extension, and that there was no basis for extension such as a lack of information available to Customs or a request by the importer for an extension.[17]

Since there was no extension of the period for liquidation, the merchandise imported by Pagoda was "deemed liquidated" 1 year after the respective entries, "at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer."[18] The "deemed liquidation" occurred by operation of law prior to the February 26, 1982, liquidation asserted by Customs.

CONCLUSION

The Government has failed to demonstrate that the trial court's findings were clearly erroneous or that the court erred as a matter of law.[19] The judgment of the Court of International Trade, holding that liquidation was deemed to have occurred by operation of law

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[14] 19 U.S.C. § 1504(b) (1982).
[15] 19 U.S.C. § 1504(b)(2) (1982).
[16] *Pagoda*, 617 F. Supp. at 99; *see Old Republic*, 8 Ct. Int'l Trade at 3.
[17] 19 U.S.C. § 1504(b)(1), (3) (1982); *see* 19 C.F.R. § 159.12 (1985).
[18] 19 U.S.C. § 1504(a) (1982); *see Old Republic*, 8 Ct. Int'l Trade at 3.
[19] FED. R. CIV. P. 52(a); *Daw Indus.*, 714 F.2d at 1142, 1 Fed. Cir. (T) at 148.

prior to the February 26, 1982, liquidation asserted by Customs, is affirmed.

AFFIRMED

(Appeal No. 86-750)

PAGODA TRADING CORP., APPELLEE *v.* UNITED STATES, APPELLANT

BISSEL, *Circuit Judge,* dissenting in part.

I respectfully dissent from that portion of the majority's opinion which holds that Pagoda's protest was sufficient to establish jurisdiction for the court to decide the "deemed liquidation" issue. Although there is certainly merit to the majority's view, I am not convinced of the soundness of its conclusory treatment of the term "decision" in 19 U.S.C. § 1514. The majority merely states, as if it is intuitively obvious, that "deemed liquidation" is a "new ground" under 19 U.S.C. § 1514(c)(1) and the "liquidation" is not a separate decision from the "appraisement" or "classification" decisions.

Section 1514(a) provides that:

> [D]ecisions of the appropriate customs officer * * *, as to—
> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable;
> * * *
> * * * * * * *
> (5) the liquidation or reliquidation of an entry, * * *
> shall be final and conclusive upon all persons unless a protest is filed * * *. [Emphasis added].

Section 1514(c)(1) provides:

> "A protest of a *decision under subsection (a)* * * * shall be filed in writing * * * setting forth distinctly and specifically *each decision* described in subsection (a) of this section as to which protest is made * * *. A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. [Emphasis added].

It is my view that the supplement filed by Pagoda constitutes a challenge to the decision to "liquidate," a § 1514(a)(5) decision, and is not merely a "new ground" to challenge the "appraisement," a § 1514(a)(1) decision, or the "classification," a § 1514(a)(2) decision.

It appears that the majority opinion holds that henceforth an importer may challenge any aspect of the Customs Officer's entry determination at any time before disposition of the protest because only "one" administrative decision is actually made rather than

separate and distinct administrative decisions regarding appraisement, classification, liquidation, etc. *See* 19 U.S.C. § 1514(a)(1)–(7). Restated, the decision *to liquidate* (legality of the act) is subsumed within a decision on appraisement or classification (correctness of the act). While this holding may be pleasing to sound notions of equity, it does not square with the statute's delineation of "separate and distinct decisions" that are made by the Customs Officers at time of possible entry. *See United States* v. *Deringer*, 593 F.2d 1015, 1020 (CCPA 1979) ("The statute contemplates that both the legality and correctness of a liquidation be determined, at least initially, via the protest procedure. The wording of this statute makes it clear that any challenge to the propriety of a liquidation [not specifically excepted] must be through this statute.") *Cf. Computime, Inc.* v. *United States*, 772 F.2d 874 (Fed. Cir. 1985) (a protest must set forth distinctly and specifically the challenges to an entry).

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 86–107)

PHILIPP BROTHERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–4–00528

[Decision on remand upheld.]

(Decided October 22, 1986)

Donohue and Donohue (James A. Geraghty), for plaintiff.
Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, and *Elizabeth C. Seastrum*, Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This is a challenge to an annual review determination of the International Trade Administration of the Department of Commerce ("Commerece") regarding countervailing duties on exports of Brazilian pig iron. On February 14, 1986, this court remanded this matter to Commerce for reconsideration of two findings. *Philipp Bros., Inc.* v. *United States*, 10 CIT ——, 630 F. Supp. 1317 (1986), *appeal dismissed*, No. 86–1122 (Fed. Cir. July 18, 1986). First, the court found that there was no adequate explanation for the use of a country-wide methodology in calculating additional duties based on subsidies, given the availability and previous use of company specific data demonstrating substantial differences in the subsidies provided various companies. *Id.* at 1322–23. The court later made clear that reconsideration of the methodology utilized was required.

On remand, Commerce determined that in calculating a country-wide subsidy rate it would not include data on subsidies provided one particular producer, inasmuch as such subsidies materially varied in amount from those provided other relevant producers. Plaintiff does not challenge this result and the court will not address it further.

Second, the court directed Commerce to clarify whether it treated failure to timely collect a tax to offset an export credit subsidy as a

separate countervailable subsidy. Commerce has clarified that this is not a separate subsidy, rather the delay is considered in calculating the value of the credit subsidy. The treatment of the tax offset will be reviewed on this basis.

The record before the court indicates the following. Producers of pig iron qualify for the Brazilian government's export credit upon shipment. Actual payment of this credit does not occur at a fixed time thereafter, due to delays in making application for the subsidy and administrative variables. Normally, payment would occur, however, within two to three months of shipment. Following negotiations with the United States, the Brazilian government agreed that the export credit would be offset by a tax to be levied on the concerned producers. The United States was advised that collection of the tax would occur in mid-1981.[1] Collection actually began on December 31, 1982. Commerce indicates that, in conformity with the terms of a suspension agreement regarding tool steel from Brazil, it would have considered the credit fully offset, if a tax in the same amount were paid within forty-five days of shipment. Inasmuch as the taxes were not paid within forty-five days of any 1981 shipment, the amount of the tax offset was reduced by an amount equivalent to the value of an interest-free loan made forty-five days after shipment.

Plaintiff argues that this methodology is unreasonable, arbitrary and capricious because the credit is accounted for upon accrual, that is, the date of shipment. To be consistent, plaintiff argues, the tax offset must also be accounted for upon accrual, presumably, the date of shipment.[2] Such procedure would result in a total offset. Plaintiff is correct on one point. Symmetry in accounting for credits and their corresponding offsets is desirable, but the issue here is whether this apparent lack of symmetry renders Commerce's procedures unlawful.

One approach to this issue is to examine how plaintiff's proposed methodology relates to reality. Under plaintiff's view the credit and offset would be accounted for upon shipment, thus eliminating any calculation for delay in payment. Here only the credit possibly was paid within a relatively short time of shipment. The tax certainly was not paid any earlier than one year from the time of shipment. Thus, there is no real symmetry in plaintiff's proposed methodology, it is merely a way of ignoring the delay.[3]

Presumably, producers price with a view to credits they know will be received. Reasonable producers also price with a view to taxes which will not be collected or will be collected at some far-off time. In this case, the implementing administrative decree by the Brazilian government set no time for the payment of the offset tax, a like-

[1] The year under review was 1981. The reference in the court's earlier opinion to 1980 was inadvertent. *Philipp Bros., Inc. v. United States*, 630 F. Supp. at 1319.
[2] It is not entirely clear from the record when a tax accrues under Brazilian law.
[3] Plaintiff indicates that it does not seek a cash basis accounting because the record does not contain the necessary information.

ly signal that some delay in collection would occur. Therefore, accounting for the delay probably serves the goals of the countervailing laws. That is, although subsidies need not be directly related to prices, subsidization tends to allow lower prices, a situation Congress attempts to remedy through the imposition of additional duties. Most importantly, however, there was nothing unlawful or unfair to plaintiff about the methodology chosen by Commerce. Given the facts available to Commerce it was reasonable, both in terms of countervailing law generally, and with regard to plaintiff in particular.

Commerce's determination on remand is upheld.

(Slip Op. 86–108)

NATURE'S FARM PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–05–00605

OPINION

[Defendant's motion to dismiss granted.]

(Decided October 22, 1986)

Mosher, Pooley, Sullivan & Hultquist (Alan B. Kalin) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Saul Davis*) for the defendant.

AQUILINO, *Judge:* A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in this Court of International Trade "only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced". 28 U.S.C. § 2637(a).

Pursuant to CIT Rule 5(g), this action was deemed commenced on April 23, 1984, the date on which a summons was sent by certified mail to the Clerk of the Court contesting Customs Service denial on October 26, 1983 of a protest by the above-named importer. Thus, in accordance with 28 U.S.C. § 2636(a), the 180th or last day to commence this action was April 23, 1984, at which time counsel claims to have caused a check in the requisite amount in dispute to be mailed to Customs.

Receipt of the money after the deadline has engendered a motion by the defendant to dismiss this action on the ground of failure to comply with 28 U.S.C. § 2637(a). That is:

> * * * [M]ailing a check for the duties does not qualify the duties as "having been paid" under § 2637(a) * * *. Rather for a plaintiff to have fulfilled the mandatory statutory conditions precedent to suit, Customs must have *received* payment of the duties *prior* to commencement of this action.[1]

[1] Defendant's Response to Plaintiff's Opposition to Defendant's Motion to Dismiss, p. 3 (emphasis in original).

In the face of the statute's clear mandate[2], the plaintiff seeks to rely on *Champion Coated Paper Co.* v. *United States*, 24 CCPA 83, T.D. 48411 (1936), and *Dynasty Footwear* v. *United States*, 4 CIT 196, 551 F.Supp. 1138 (1982). Neither case, however, aids the plaintiff. In *Champion Coated Paper*, the court held that, in order to protest reliquidation of drawback entries under the Tariff Act of 1922, an importer must have repaid the refunded duties. In its opinion, the court explained that part of the rationale for this condition precedent is that an importer be "actionably damaged." 24 CCPA at 89. The decision does not suggest that late payment of duties satisfies this requirement.

Dynasty Footwear also does not modify the requirement of timely payment of duties owed. In that case, the court found that monies sufficient to pay those duties were already in the possession of Customs prior to commencement of the action as a result of a protest as to another entry. *See* 4 CIT at 197, 551 F.Supp. at 1139. The amount owed to the importer on that entry exceeded the duties it had to pay to start the action, and the court concluded that set-off pursuant to 19 C.F.R. § 24.72 should have been made when it reasonably could have been made, which was deemed prior to the date of commencement. *See* 4 CIT at 201, 551 F.Supp. at 1142.

The plaintiff urges this court "to do justice where it need be done"[3] by denying defendant's motion. However, this court is not persuaded that it has discretion in the matter. For example, in *United States* v. *Lockheed Petroleum Services, Ltd.*, 709 F.2d 1472 (Fed.Cir. 1983), the court held that the importer was not entitled to an award of drawback duties because it had failed to timely file an abstract of manufacture with the district director, as mandated by regulation. The abstract had been mailed, but failed to arrive on time, whereupon the court pointed out that the importer

> could have filed the abstract in a timely fashion in any number of ways to ensure compliance with the regulation, utilizing such well-known means as a telecopier, a messenger, or an overnight courier service. If it wished to use the U.S. Postal Service, it could have resorted to express mail, special delivery, or registered mail. It chose instead to rely solely on the ordinary post. 709 F.2d at 1475.

The importer was found to have been negligent in allowing only five days for the abstract to be mailed from Louisiana to New York and then back to Louisiana.

Here, of course, the plaintiff did not allow any time for the check to be delivered before the deadline. In *Lockheed*, the court stated that "[e]quitable powers, even if available, should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable due care and diligence." 709 F.2d at 1475. Recently, the Federal Circuit has reiterated that the

[2] *See Bulova Watch Co., Inc.* v. *United States*, 9 CIT 67 (1985).
[3] Plaintiff's Memorandum, p. 8.

> terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade * * * must be strictly observed and are not subject to implied exceptions * * *. If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit."[4]

The plaintiff argues that "it is generally true that the date of mailing is determinative in connection with the commencement of an action." Plaintiff's Memorandum, p. 5, n. 2. CIT Rule 5(g) is referred to in an attempt to show that the question at bar is governed by its provision that:

> Service or filing of any pleading or other paper by delivery or by mailing is completed when received, except that a pleading or other paper mailed by registered or certified mail properly addressed to the party to be served, or to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed served or filed as of the date of mailing.

This rule, however, applies to the filing of papers with the court, not to payment of duties owed to Customs.[5]

This national court provides for the needs of out-of-town parties and their counsel. *Cf. Modern Clothing, Inc.* v. *United States,* 73 Cust.Ct. 233, C.R.D. 74–10 (1974); *Texas Mex Brick & Import Co.* v. *United States,* 72 Cust.Ct. 291, C.R.D. 74–2, 371 F.Supp. 579 (1974). But the plaintiff herein was not prejudiced by the geography involved since its check was mailed on the 180th or last day and could not have arrived in a timely manner regardless of locality. Plaintiff's situation is thus in sharp contrast to that of the plaintiff in *Charlson Realty Company* v. *United States,* 384 F.2d 434 (Ct.Cl. 1967), which had allowed "substantially more than sufficient time"[6] to mail its petition for a refund of income taxes to the Court of Claims for filing. Moreover, it was not argued in *Charlson* that the mailing date should be held to be synonymous with the filing date. *See* 384 F.2d at 447 (Jones J., concurring).

The plaintiff takes the position that the rationale for the "Mailbox Rule", which is known to all law students"[7], should be applied here. According to *Adams* v. *Lindsell,* 106 Eng.Rep. 250 (K.B. 1818), an acceptance of an offer by mail is effectuated upon the mailing of the acceptance. But, as Professor Corbin points out:

> * * * For almost all purposes, other than the acceptance of an offer, the mere mailing of a letter is not enough to attain the purpose. Unless it is clearly otherwise agreed, the mailing of a letter is not a sufficient notice to quit a tenancy, it is not actual payment of money that is inclosed, it does not transfer title to a

[4] *Georgetown Steel Corporation* v. *United States,* —— F.2d, —— (Fed.Cir. Sept. 18, 1986) (citations omitted).

[5] Furthermore, the rule specifies the mode of mailing. While the record shows receipt herein of plaintiff's summons by certified mail, it also indicates that the check in question was placed in the regular mail by counsel's secretary, and the court notes in passing that an action can be dismissed for failure to affix proper postage. *See, e.g., NEC Corporation* v. *United States,* 9 CIT 557, 622 F.Supp. 1086 (1985), *reh'g denied,* 10 CIT ——, 628 F.Supp. 976 (1986).

[6] 384 F.2d at 447 (Jones J., concurring).

[7] Plaintiff's Memorandum, p. 5.

> check or other document; it will not ordinarily be sufficient notice required by a contract as a condition precedent to some contractual duty of immediate performance. 1 Corbin, Contracts § 80 (1963 ed.) (footnotes omitted).

This analysis has support in case law. For example, in *Sizemore* v. *E.T. Barwick Industries, Inc.*, 225 Tenn. 226, 465 S.W.2d 873 (1971), the court held that a suit for workmen's compensation was timely commenced as it had been filed within one year of actual receipt of the last voluntary payment made by the insurance carrier. The trial judge's view that the suit was barred by the statute of limitations, as it had been instituted more than a year from the date of mailing, was rejected. In *Stream* v. *C.B.K. Agronomics, Inc.*, 79 Misc.2d 607, 361 N.Y.S.2d 110 (Sup.Ct. N.Y. Co. 1974), *modified on other grounds*, 48 App.Div.2d 637, 368 N.Y.S.2d 20 (1st Dep't 1975), the failure of a debtor's monthly installment payment to arrive on time in the mail was ground for immediate loan repayment under an acceleration clause of a promissory note.

Finally, counsel's attempt to equate plaintiff's position with that of a federal taxpayer is also unpersuasive in view of 26 U.S.C. § 7502, which specifically provides that timely mailing of taxes is treated as timely payment thereof. The absence of a similar provision governing payment of duties owed to Customs compels the court to enter judgment, granting defendant's motion to dismiss this action.

(Slip Op. 86–109)

WREGG IMPORTS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–07–00961

Before DICARLO, *Judge.*

Plaintiff challenges classification of wooden "matreshkas" as dolls under item 737.22 of the Tariff Schedules of the United States (TSUS), contending that the merchandise is properly classified as articles of wood, not specially provided for, under item 207.00, TSUS. Plaintiff argues that the merchandise is not a doll because it does not have distinct body parts, does not resemble a child's plaything, and is not known as a doll in the United States.

Held: The merchandise is a doll and is properly classified under item 737.22, TSUS. A doll within the meaning of the TSUS does not have to be anatomically correct. The subject merchandise represents a human, resembles a child's plaything and is primarily known and used as a doll in the United States.

[Judgment for defendant.]

(Decided October 23, 1986)

Stein Shostak Shostak & O'Hara (Joseph P. Cox) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Judith M. Barzilay* and *Nancy E. Reich)*, for defendant.

DiCarlo, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of certain "matreshkas" as dolls under item 737.22 of the Tariff Schedules of the United States (TSUS). Plaintiff contends the merchandise is properly classifiable as articles of wood, not specially provided for, under item 207.00, TSUS. The Court concludes that the merchandise was correctly classified as a doll under item 737.22, TSUS.

Based upon the stipulations, exhibits and testimony at trial, the Court finds that matreshkas are wooden articles handcrafted and hand painted in various regions of the Union of Soviet Socialist Republics (U.S.S.R.). Each matreshka is comprised of wooden components, each "nested" inside of the next larger component. With the exception of the very smallest, each of the matreshka's components is hollow in construction.

Generally "bowling-pin" in shape, the matreshkas come in various sizes with between 3 and 18 separate nested components. The nested parts are not sold separately and are not interchangeable with components of another matreshka since each is individually crafted. Each component has a painted human face (including hair, eyebrows, eyelashes, eyes, nose, mouth and cheeks) and peasant-style clothing indicative of the region in the U.S.S.R. where crafted. Components also may have painted-on arms, hands and fingers.

Plaintiff first contends that the matreshkas are not dolls because they do not possess distinct human limbs and other body parts. After examination of the relevant caselaw in which particular articles were adjudged to be dolls or not dolls, the Court finds no requirement that a doll have distinct arms, legs and other human features. Often dolls do not have identifiable hands, fingers, toes, feet, ears and other human attributes, while some dolls only have these and similar features such as nose, mouth, and eyes painted-on. *See* trial transcript at p. 86; defendant's exhibit A–1.

The Court concludes that an article does not have to be anatomically correct to be classified as a doll under the TSUS when its overall effect is representative of a human. The matreshkas under consideration clearly represent humans. They depict Slavic peasants with relatively realistic human faces and clothing typical of the region in which they are manufactured.

Plaintiff next suggests that the ruling in *American Customs Brokerage Co.* v. *United States,* 60 Cust. Ct. 23, C.D. 3246, 278 F. Supp. 316 (1968) establishes three criteria to be met before an imported article is to be viewed as a doll under the TSUS. The court in that case held that certain figures of Hawaiian hula girls, mounted by spring on a magnetic metal base, are dolls within the meaning of the TSUS because the record established "(i) that they are similar to dolls used as children's playthings; (ii) that they are used for ornamental purposes; and (iii) that they are known as 'dolls' in the wholesale and retail trade." *Id.* at 26, 278 F. Supp. at 319. Plaintiff argues that the subject merchandise does not satisfy the first crite-

rion since a matreshka is an unamusing and non-communicative "static" object which does not "resemble" a child's plaything.

The court in *American Customs Brokerage* held that the merchandise before it was a doll based upon three independent factual findings. The court did not intend that its findings become criteria for determining in all cases whether an article is a doll. For example, an article could still be found to be a doll even though used for purposes other than ornamentation or in the absence of proof that it is known as a doll in the trade or industry.

As in *American Customs Brokerage* in any event, the Court after examining the exhibits finds that the merchandise does "resemble" a child's plaything. Even though no testimony at trial indicates that it is actually used as a child's toy, the Court accepts as established the rule that a doll also can be used for decorative, ornamental, or religious purposes. *See, e.g., Russ Berrie & Co., Inc.* v. *United States,* 76 Cust. Ct. 218, 223–24, C.D. 4659, 417 F. Supp. 1035, 1039–40, *appeal dismissed,* 63 CCPA 125 (1976) (and cases cited therein).

Defendant is correct in recognizing that the provision for dolls is an *eo nomine* one, as opposed to a use provision. *See Id.* at 223, 417 F.Supp. at 1039. Defendant leads us to believe that acknowledging dolls as an *eo nomine* provision resolves any controversy in the present case. An *eo nomine* provision is one which describes merchandise by a specific name, usually one well known in the trade, which includes all forms of the article as if each were provided for by name in the tariff provisions.

It begs the question, however, to argue that a matreshka is therefore a doll because doll within the meaning of the TSUS includes all forms of the article. The question to be answered by this Court is whether the matreshkas under consideration are to be identified as a doll within the meaning of the TSUS. The *eo nomine* aspect becomes helpful in providing a category for classification in the TSUS only after this determination.

In *United States* v. *Quon Quon Co.,* 46 CCPA 70, C.A.D. 699 (1959) the court held that the ultimate use of a product in the United States may be considered in order to determine an article's identity in relation to an *eo nomine* provision. The *Quon Quon* Court reasoned that "[of] all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, *use is of paramount importance." Id.* at 73 (emphasis added).

The Court finds that matreshkas are sold primarily as dolls and used by doll enthusiasts to enhance their collections. Defendant's exhibits C and D are representative samples of importers' advertisements describing matreshkas as dolls. Defendant's witness testified that she considered matreshkas to be dolls, basing this opinion upon her experience as a doll collector and upon several books and articles, including her own, which refer to them as such. She also testified she has purchased matreshkas from the doll sections of toy

stores and has seen them on display at doll shows. Defendant's other witness, a Customs official responsible for the TSUS provision covering dolls, testified that he has seen matreshkas for sale in the doll section of the United Nations gift shop.

Plaintiff's witnesses offered opinion testimony that matreshkas are not dolls. Certain of plaintiff's witnesses further testified that they have seen them sold in sections of stores not dedicated to dolls and have themselves held them out as Russian folk art rather than dolls. Although some importers and store owners may not consider matreshkas to be dolls, the Court finds after weighing the evidence that matreshkas are predominately known and used (sold and collected) as dolls in the United States.

The Court concludes that plaintiff has failed to rebut the presumption in favor of defendant by demonstrating Customs classification to be incorrect. The Court affirms the classification of the merchandise as dolls under item 737.22, TSUS. Judgment will be entered accordingly.

(Slip Op. 86–110)

MILLER AND CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–4–00576

[Dismissed.]

(Decided October 24, 1986)

Plaia & Schaumberg, Chartered (*Herbert C. Shelley* and *Joel D. Kaufman*), for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, and *Elizabeth C. Seastrum*, Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This action challenges a determination upon the annual review of a countervailing duty order regarding Brazilian pig iron. The year under review was 1981. In this court's previous opinion in this matter, *Miller and Co.* v. *United States,* 8 CIT 281, 598 F. Supp. 1126 (1984), this court determined that no jurisdiction existed for an action under 28 U.S.C. § 1581(c) (1982) inasmuch as plaintiff did not participate in the underlying administrative proceedings. *See* 19 U.S.C. § 1516a(a)(2)(A) (1982) (participation made a prerequisite to suit). The only possible jurisdictional basis remaining for suit is 28 U.S.C. § 1581(i) (1982), the residual jurisdiction of the court. In the court's previous opinion, the court determined that such jurisdictional basis would be proper only if defendant's actions were patently *ultra vires,* so that plaintiff could not be expected to participate administratively. The court found it could not make

such a determination without briefing on the merits of the action. *Miller,* 8 CIT at 286, 598 F. Supp. at 1131.

This matter has now been briefed fully. In the interim, *however,* two cases have been decided which shed light on this matter, and which lead to the conclusion that the defendant did not act in an *ultra vires* manner in issuing the challenged determination. The first is *Ambassador Division of Florsheim Shoes,* 748 F.2d 1560 (Fed. Cir. 1984). The second is *Philipp Bros., Inc.* v. *United States,* 10 CIT ——, 630 F. Supp. 1317 (1986), *appeal dismissed,* No. 86–1122 (Fed. Cir. July 18, 1986).

In *Florsheim,* the Federal Circuit determined that suspension of liquidation pending completion of the relevant annual review was required by the countervailing duty laws. The court in *Philipp Bros.* found that such a suspension does not terminate prior to completion of the review, even if the Commerce Department does not complete its review within the statutorily directed time. *See* 19 U.S.C. § 1675(a) (1982) (review to be completed "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order").[1] In essence, the court found that the time limits of § 1675(a) are not jurisdictional,[2] and that governmental delay alone does not preclude completion of the administrative process. Furthermore, because a statutorily required suspension was in effect, the court found that 19 U.S.C. § 1504 (1982) did not prevent imposition of additional duties by effecting a liquidation by operation of law.[3] Plaintiff has raised no arguments which convince the court that *Philipp Bros.* is in error. *Philipp Bros.* flows directly from *Florsheim.* There is no way to distinguish this case from *Philipp Bros.* on this point. *Stare decisis* applies. Thus, the court concludes that Commerce did not act beyond its authority here.

Accordingly, the court finds that there is no jurisdiction for this action under 28 U.S.C. § 1581(i) and it is dismissed.

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[1] 19 U.S.C. § 1675(a) was amended in 1984 to make annual reviews necessary only upon request. Trade and Tariff Act of 1984, Pub. Law 98–573, § 611(a)(2)(A), 98 Stat. 3031 (1984).

[2] A suit to compel timely action may be the appropriate response to failure to comply with 19 U.S.C. § 1675(a). *American Permac, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–83 (August 12, 1986); *see also UST, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–100 at 12 (October 10, 1986) (citing *Philipp Bros.*).

[3] Liquidation is the term for the finalization of the duty assessment process. 19 U.S.C. § 1504 (1982) read in relevant part:

> (a) Liquidation
> Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:
> (1) the date of entry of such merchandise;
> * * * * * * * * *
> shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent. * * *
> (b) Extension
> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if —
> * * * * * * * * *
> (2) liquidation is suspended as required by statute or court order;
> * * * * * * * * *

Later amendments to this provision are irrelevant to the issues at hand.

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U.S. Customs Service
T.D. 86-196

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

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U.S. Customs Service

Treasury Decision

19 CFR Part 103

(T.D. 86–196)

CUSTOMS REGULATIONS AMENDMENT RELATING TO EXCHANGE OF INFORMATION WITH FOREIGN AGENCIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide the Commissioner of Customs or his designee with authority to authorize officers of the Customs Service to exchange information with foreign customs and law enforcement agencies pursuant to bilateral and multilateral obligations or whenever such exchanges are necessary to assist in U.S. investigations or judicial and quasi-judicial proceedings. This amendment is necessary to implement a section of the recently enacted Anti-Drug Abuse Act of 1986, P.L. 99–570.

EFFECTIVE DATE: November 10, 1986.

FOR FURTHER INFORMATION CONTACT: Doris Robinson, Regulations Control and Disclosure Law Division (202–566–8681).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 27, 1986, the President signed into law the "Anti-Drug Abuse Act of 1986" (P.L. 99–570), ("the Act") which provides for a wide range of programs and measures to enhance efforts to counteract the problem of drug abuse in the U.S. Among these measures are several dealing with increased enforcement of drug laws and interdiction of drug trafficking.

In particular, titles I through III of the new law relate to drug law enforcement measures. Titles II and III address the significant changes made to the customs laws, including other laws enforced by the Customs Service.

One such change, contained in § 3127 of the Act, amends the Tariff Act of 1930 (19 U.S.C. 1201 *et seq.*), by adding a new § 628 (19

U.S.C. 1628), providing for the exchange of information or documents with foreign customs and law enforcement agencies. Pursuant to new § 628, the exchange is allowed if the Secretary of the Treasury reasonably believes the exchange of information is necessary to:

(1) ensure compliance with any law or regulation enforced or administered by the Customs Service;

(2) administer or enforce multilateral or bilateral agreements to which the U.S. is a party;

(3) assist in investigative, judicial and quasi-judicial proceedings in the U.S.; and

(4) an action comparable to any of those described in paragraphs (1) through (3) undertaken by a foreign customs or law enforcement agency, or in relation to a proceeding in a foreign country.

The information may be provided to the foreign customs or law enforcement agencies only if the Secretary of the Treasury obtains assurances from these agencies that such information will be held in confidence and used only for the law enforcement purposes for which it was provided. No information may be provided to any foreign customs or law enforcement agency that has violated any of these assurances.

Part 103, Customs Regulations (19 CFR Part 103), concerns the availability of information provided the public under the Freedom of Information Act, as amended (5 U.S.C. 552). This part supplements regulations of the Department of the Treasury contained in 31 CFR Part 1, concerning public access to records, provides procedures by which the public may obtain access to records maintained by Customs, and includes provisions governing the release of certain information to the press and the giving of testimony or the production of Customs Service documents in court proceedings.

To implement § 3127 of the Anti-Drug Abuse Act of 1986, a new § 103.18, Customs Regulations (19 CFR 103.18), is being added to Part 103, to provide for the exchange of information between the Customs Service and foreign customs or law enforcement agencies. This new § 103.18 tracks the language of § 3127, but delegates the authority to authorize the exchange of information to the Commissioner of Customs or his designee. Accordingly, it conforms the regulations to the new law.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Inasmuch as this amendment involves a foreign affairs function of the U.S., implements a statutory requirement, and involves a matter in which the public is not directly involved, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary, and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

EXECUTIVE ORDER 12291

Because this document involves a foreign affairs function it is not subject to E.O. 12291.

REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of §§ 603 and 604 of Title 5, United States Code, as added by § 3 of P.L. 96–354, the "Regulatory Flexibility Act." That Act does not apply to any regulation, such as this, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 103

Freedom of information.

AMENDMENT TO THE REGULATIONS

Part 103, Customs Regulations (19 CFR Part 103), is amended as set forth below.

PART 103—AVAILABILITY OF INFORMATION

1. The general authority citation for Part 103 is revised to read as follows:

Authority: 5 U.S.C. 301, 552; 19 U.S.C. 66, 1624, 31 U.S.C. 9701, P.L. 99–570.

2. Part 103 is further amended by adding a new § 103.18, to read as follows:

§ 103.18 Release of information to foreign agencies.

(a) The Commissioner or his designee may authorize Customs officers to exchange information or documents with foreign customs and law enforcement agencies if the Commissioner or his designee reasonably believes the exchange of information is necessary to—

(1) ensure compliance with any law or regulation enforced or administered by Customs;

(2) administer or enforce multilateral or bilateral agreements to which the U.S. is a party;

(3) assist in investigative, judicial and quasi-judicial proceedings in the U.S.; and

(4) an action comparable to any of those described in paragraphs (1) through (3) of this section undertaken by a foreign customs or

law enforcement agency, or in relation to a proceeding in a foreign country.

(b)(1) Information may be provided to foreign customs and law enforcement agencies under paragraph (a) of this section only if the Commissioner or his designee obtains assurances from such agencies that such information will be held in confidence and used only for the law enforcement purposes for which such information is provided to such agencies by the Commissioner or his designee.

(2) No information may be provided under paragraph (a) of this section to any foreign customs or law enforcement agency that has violated any assurances described in paragraph (b)(1) of this section.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 5, 1986.

FRANCIS A. KEATING,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 10, 1986 (51 FR 40792)]

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U.S. Customs Service

Treasury Decisions

(T.D. 86–197)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
October 1, 1986	$.007394
October 2, 1986	.007446
October 3, 1986	.007438
Israel shekel:	
October 1–3, 1986	N/A
South Korea won:	
October 1–3, 1986	.001135
Taiwan N.T. dollar:	
October 1, 1986	.027189
October 2, 1986	N/A
October 3, 1986	.027218

(LIQ-03-01 S:COM CIE)

Dated: October 3, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–198)

FOREIGN CURRENCIES

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Greece drachma:	
October 6, 1986	$.007482
October 7–8, 1986	.007449
October 9, 1986	.007421
October 10, 1986	.007474
Israel shekel:	
October 6–10, 1986	N/A
South Korea won:	
October 6, 1986	.001136
October 7–10, 1986	.001137
Taiwan N.T. dollar:	
October 6, 1986	.027233
October 7, 1986	.027241
October 8, 1986	.027248
October 9–10, 1986	N/A

(LIQ–03–01 S:COM CIE)

Dated: October 10, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–199)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

October 13, 1986: Holiday.

Greece drachma:	
October 14, 1986	$.007485
October 15, 1986	.007499
October 16, 1986	.007493
October 17, 1986	.007479
Israel shekel:	
October 14–17, 1986	N/A
South Korea won:	
October 14–16, 1986	.001139
October 17, 1986	.001127
Taiwan N.T. dollar:	
October 14, 1986	.027270
October 15, 1986	N/A
October 16, 1986	.027285
October 17, 1986	.027293

(LIQ–03–01 S:COM CIE)

Dated: October 17, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–200)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
October 20, 1986	$.007416
October 21, 1986	.007407
October 22, 1986	.007427
October 23, 1986	.007394
October 24, 1986	.007236
Israel shekel:	
October 20–24, 1986	N/A
South Korea won:	
October 20–24, 1986	.001139

Taiwan N.T. dollar:	
October 20, 1986	.027300
October 21, 1986	.027315
October 22, 1986	.027322
October 23, 1986	.027330
October 24, 1986	.027337

(LIQ-03-01 S:COM CIE)

Dated: October 24, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-201)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
October 27, 1986	$.007231
October 28, 1986	.007262
October 29, 1986	.007257
October 30, 1986	.007194
October 31, 1986	.007133
Israel shekel:	
October 27-31, 1986	N/A
South Korea won:	
October 27-28, 1986	.001138
October 29-31, 1986	.001140
Taiwan N.T. dollar:	
October 27, 1986	.027345
October 28, 1986	.027352
October 29, 1986	.027360
October 30, 1986	.027367
October 31, 1986	N/A

(LIQ-03-01 S:COM CIE)
Dated: October 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-202)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-180 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Japan yen:
October 31, 1986 ..... $.006120

(LIQ-03-01 S:COM CIE)
Dated: October 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85–2343)

UNITED STATES, APPELLANT *v.* FEDERAL INSURANCE CO. AND COMETALS, INC., APPELLEES

Barbara M. Epstein, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellant. With her on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

David Serko, Serko, Simon & Abbey, of New York, New York, argued for appellee.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

(Appeal No. 85–2343)

UNITED STATES, APPELLANT *v.* FEDERAL INSURANCE CO. AND COMETALS, INC., APPELLEES

(Decided November 10, 1986)

Before MARKEY, *Chief Judge*, NIES and NEWMAN, *Circuit Judges*.

NIES, *Circuit Judge*.

The United States appeals the judgment of the United States Court of International Trade in *United States* v. *Federal Insurance Co. and Cometals, Inc.*, 605 F. Supp. 298 (Ct. Int'l Trade 1985), holding that the government is equitably estopped from collecting certain import duties from an importer, Cometals, Inc., and its surety, Federal Insurance Company. Our jurisdiction over the appeal is found in 28 U.S.C. § 1295(a)(5). We reverse and remand with the direction to enter judgment for the government.

I

This appeal raises the question of whether the government or an importer bears the risk of non-payment of import duties by a licensed broker who fails to pay over monies the broker received from the importer for payment of duties. On a theory of equitable estoppel the Court of International Trade placed the risk on the government. We disagree. In sum, we reaffirm that a licensed bro-

ker is the agent of the importer, not of the government, and that no equitable estoppel can arise against the government in connection with an obligation to pay taxes. We further hold that, in any event, no basis for equitable estoppel exists in this case. Contrary to the trial court's holding, the government violated neither statute nor regulation in accepting an uncertified check from a broker which was secured by a bond given by the importer. The importer and his surety remain liable for duties owed to the government regardless of the malfeasance or misfeasance of a broker. Where the government is aware that a broker is in a precarious financial condition or has mishandled the affairs of importers, the government is obliged to investigate and, in appropriate circumstances, to suspend or revoke the license of such broker. However, the statutory provision regarding supervision of brokers for the protection of importers in *general* creates no right in an *individual* importer to be relieved of his outstanding tax obligations, indeed, is irrelevant to his continued liability.

Thus, the Court of International Trade erred, as a matter of law, in holding that the government was equitably estopped from collecting from the importer and its surety the duties owed to the public fisc.

II

The United States, plaintiff below, brought suit in the United States Court of International Trade to recover unpaid liquidated import duties in the amount of $230,344.12, plus interest, against the importer, Cometals Inc., and its surety on a bond, Federal Insurance Company.

On May 7, 1980, an entry had been filed at the Port of Los Angeles, California, showing Cometals as importer of record of 715 drums of titanium sponge being exported from China by Japan. This entry had been made on behalf of Cometals by its customhouse broker, James Loudon & Co., Inc., which has since declared bankruptcy.

In connection with this entry, Cometals and Federal Insurance Co. had executed and delivered a general term bond to the Customs Service. Because the bond guaranteed payment of the duties, the imported merchandise was released to Cometals on the date entry was made, prior to the payment of duties. Cometals had, however, wired the amount of the import duties to Loudon's account on or about May 2, 1980. Loudon issued its own uncertified check in the amount of the estimated duties to the Customs Service on May 12, 1980.

The Customs Service accepted Loudon's uncertified check, asserting in this suit that acceptance of that check was required under Customs Regulation 19 C.F.R. § 24.1(3), which states that "an uncertified check drawn by an interested party * * * shall be accepted if

there is on file * * * an entry bond or other bond to secure the payment of duties * * *."[1]

When Loudon's check was not honored by its bank because of insufficient funds, the Customs Service obtained a second check from Loudon. However, this check was also not paid by the bank. After further attempts to secure payment from Loudon, the Customs Service then turned to the importer and its surety for payment. Upon their refusal, the government instituted suit to collect the unpaid import duties from these parties. In response to the government's complaint, Cometals and its surety asserted "equitable estoppel" as an affirmative defense, as well as a number of counterclaims against the government.[2] Ruling on cross-motions for summary judgment, the trial court denied the government's motion and granted appellees' motion, holding that the United States was equitably estopped from recovering on its claim. 605 F. Supp. at 299.

The Court of International Trade based its holding essentially on the following determinations:

(1) As a matter of law, the United States can be equitably estopped from recovering import duties if it commits affirmative misconduct.

(2) The government committed affirmative misconduct in this case by accepting an uncertified check from a customhouse broker which was secured by the bond of the importer. Customs Regulation 19 C.F.R. § 24.1(3), which requires acceptance of an uncertified check which is secured by a bond, must be interpreted to require that the customhouse broker file its own bond to secure payment of the broker's uncertified check. The interpretation by the Customs Service of 19 C.F.R. § 24.1(3) is contrary (per the court) to congressional intent and to three statutory provisions: 19 U.S.C. § 66 (regulations must be consistent with law), 19 U.S.C. § 1641(d) (Secretary shall prescribe regulations for the licensing of brokers as he may deem necessary to protect importers and the revenue of the United States), and 19 U.S.C. § 1648 (Secretary shall prescribe regulations for receiving uncertified checks in payment of duties).

(3) The government also committed affirmative misconduct by the "loose enforcement of 19 C.F.R. § 111.27," with respect to auditing of brokers, and by not following up on a 1977 audit of Loudon, which showed a "severe net worth deficiency."

The trial court noted in connection with the last point that Loudon's September 1977 financial statement, obtained as a result of an audit, showed that Loudon's liability exceeded its assets by

[1] 19 C.F.R. § 24.1(3) reads in pertinent part as follows:

§ 24.1 Collection of customs duties, taxes, and other charges.

* * * * * * *

(3) An uncertified check drawn by an interested party on a national or state bank or trust company of the United States or a bank in Puerto Rico or any possession of the United States if such checks are acceptable for deposit by a Federal Reserve bank, branch Federal Reserve bank, or other designated depository shall be accepted if there is on file with the district director an entry bond or other bond to secure the payment of the duties, taxes, or other charges

* * *

[2] All of the counterclaims were dismissed for lack of jurisdiction with the exception of a claim for "equitable recoupment" which the court did not find necessary to decide in view of its upholding the defense of equitable estoppel. This counterclaim fails, *inter alia*, for the same reason as the defense of estoppel.

over $164,000.00 and that Loudon had been responsible for more than $190,000.00 in overdrafts. In late 1979 and early 1980, six of Loudon's checks covering Cometals' entries were originally not paid by Loudon's bank because of insufficient funds, but all except the last, which was for the duties of this case, were paid on resubmission. Despite these warning signs since 1977, the government made no further audit of Loudon. It continued to accept Loudon's uncertified checks where the duties were guaranteed by a bond.

The trial court concluded that, in its view, the government "disregarded its own regulations, interpreted a decisive regulation unlawfully, and disregarded the manifest intention of Congress" and, thus, was equitably estopped from recovery on its claim. 605 F. Supp. at 299. The court acknowledged that "the opinion in *Air-Sea Brokers* v. *United States,* 66 C.C.P.A. 64, C.A.D. 1222, 596 F.2d 1008 (1979) held that equitable estoppel is not available in cases involving the collection of duties on imports." It distinguished *Air-Sea Brokers* from this case on the ground that the earlier decision did not involve the agency's breach of a regulation or statute, as did the case at hand, but rather "milder and more ambiguous" conduct by government employees. *Id.* at 304. The court also noted the decision of the Supreme Court in *Heckler* v. *Community Health Services of Crawford,* 104 S. Ct. 2218, 2224 (1984), which implies that the government could be estopped although on a more stringent standard than a private litigant.

Relying on the violations it perceived, the court opined that the reasons for generally denying estoppel against the government could not justify the government's misconduct in failing to protect the importer and the public revenue. Thus, the suit by the government was not in the public interest. To uphold the government would encourage the government in its disobedience of the law. Under these circumstances, the government had "no right to resist the just effect of equitable estoppel." *Id.* at 305.

III

In *Air-Sea Brokers,* the Court of Customs and Patent Appeals, a predecessor of this court whose decisions are binding precedent (*South Corp.* v. *United States,* 690 F.2d 1368, 1370–71, 215 USPQ 657, 657–58), held without equivocation:

> Accordingly, we hold that equitable estoppel, even if available in cases involving the Government in its proprietary capacity, is not available against the Government in cases involving the collection or refund of duties on imports.

596 F.2d at 1011. In reaching its decision, our predecessor relied on *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180, 183 (1957) in which the Supreme Court stated, in connection with a tax claim, that "[t]he doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law."

Contrary to the analysis of the trial court, the decision in *Air-Sea Brokers* was not dependent on the "milder and more ambiguous" nature of the conduct of a particular government employee in contrast to the breach of the statute or regulation by the Secretary's wrongful interpretation of his authority. The case holds broadly that no estoppel can arise against the sovereign act of tax collection. Even if this panel disagreed with that tenet, it is powerless to overturn it.

Nor are we inclined to recommend reconsideration of settled law by this court *in banc* in this case. If we assume that an equitable estoppel might be found in extraordinary circumstances, the holding by the trial court on equitable estoppel is based on an erroneous interpretation of the statute and regulations. There is no "illegal" conduct by the agency on which to predicate an estoppel in this case.

The trial court held that 19 C.F.R. § 24.1(3) (*supra*, note 1) must be interpreted to require that an uncertified check of a broker shall be accepted only if a bond has been posted *by the broker*. In the words of the trial court:

> The regulation in question, 19 C.F.R. § 24.1(3), must be interpreted so that it comports with the law, in which case, the bond posted *must* be the bond of the party making payment. Any interpretation of this regulation which would allow the bond of the importer to protect the legal obligation of the broker is unlawful.

605 F. Supp. at 302.

Only if the broker posts the bond, per the court, have the interests of the importer and the public revenue been protected as required by 19 U.S.C. § 1641(d). The Secretary, on the other hand, has taken the position, since at least 1955, that the government must accept an uncertified check if the bond *of any interested party* is posted covering the payment of the duties for which the check is tendered. As stated in the explanation of the amendment to section 24.1(3) which changed the language of the regulation to that which is under consideration:

> Section 24.1 (3) now contains a provision that an uncertified check which can be cashed without expense to the Government shall be accepted by the collector of customs in payment of duties and other charges if drawn and tendered by a business or other organization, or by an individual, "who has on file with the collector of customs a customs entry bond or other bond to secure the payment of such duties or other charges." *It is [sic, was] not intended that this provision be interpreted as requiring that the drawer of the check and the principal on the bond shall necessarily be the same person or organization, and it is deemed desirable to clarify the regulation on this point.*

20 Fed. Reg. 8,775 (1955).

Thus, the interpretation which the trial court finds clearly illegal and contrary to congressional intent is one explicitly announced and consistently applied for more than 30 years.

We have no record here from which we might learn the advantages, as opposed to the disadvantages, to importers in having an importer—as opposed to his broker—post the bond. However, since no importer has previously challenged the government's interpretation, despite hundreds of thousands of entries, we can only surmise that the government's interpretation is not wholly unsatisfactory to the importing community. Nor has Congress undertaken to overrule the Secretary's interpretation despite numerous opportunities since 1955. "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

The foregoing historical facts were not taken into consideration by the trial court in holding that the Secretary's interpretation of 19 C.F.R. § 24.1(3) was illegal. The function of a court is not, of course, to determine in this type of situation whether the Secretary's interpretation is the only possible interpretation of the statute, *Chemical Manufacturers Assoc.* v. *Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102, 1108 (1985), but to determine whether the Secretary's interpretation is reasonable. As held in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Given the Secretary's long-standing and consistent interpretation, a court must be particularly circumspect in substituting its view of the statute for that of the agency charged with the responsibility for its administration. *See Young* v. *Community Nutrition Institute*, 106 S.Ct. 2360 (1986).

In holding that the Customs Service violated the statute in accepting an uncertified check of the broker not backed by the broker's own bond, as indicated, the trial court relied on three statutory provisions, which the court held were in *pari materia*, each of which grants the Secretary authority to issue certain regulations: 19 U.S.C. § 66, 19 U.S.C. § 1641(d) and 19 U.S.C. § 1648. Each of these provisions must be examined in turn.

SECTION 66

Section 66 is of no significance to the issue of whether the Secretary's interpretation of section 24.1(3) is legal or illegal. Section 66 provides simply that the Secretary shall prescribe rules and regulations with respect to import duties not inconsistent with law.[3]

[3] 19 U.S.C. § 66 provides:

The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

SECTION 1641

Section 1641 deals with the licensing of brokers. It provides, *inter alia*, that no one may act as a customhouse broker without a license, and for the Secretary to prescribe rules and regulations governing their licensing. Section 1641(b), which authorizes revocation or suspension of a broker's license upon notice, and a due process hearing, provides:

> [After notice and a hearing] the said Secretary of the Treasury shall have the right to revoke or suspend the license of any customhouse broker shown to be incompetent, disreputable, or who has refused to comply with the rules and regulations issued under this section, or who has, with intent to defraud, in any manner willfully and knowingly deceived, misled or threatened any importer, exporter, claimant or client,* * * by word, circular, letter or by advertisement.

Section 1641(d), which the trial court found was violated by the Secretary's interpretation of his regulation, reads as follows:

> (d) Regulations by Secretary. The Secretary of the Treasury *shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States,* and to carry out the provisions of this section, including rules and regulations requiring the keeping of books, accounts, and records by customhouse brokers, and the inspection thereof, and of their papers, documents, and correspondence by, and the furnishing by them of information relating to their business to, any duly accredited agent of the United States. (Emphasis added)

In connection with enacting the comprehensive plan of section 1641 to regulate brokers, the legislative history contains the following expression of congressional intent:

> Although the great majority of these brokers are entirely above reproach in the conduct of their business, the corrupt practices of a few, unhampered by adequate statutory provisions for supervision, have proved a grave menace to importers and customs revenue alike. The present amendments are designed to remedy this situation. They will give to the Secretary of the Treasury the power to regulate the conduct of the business of customhouse brokers in such a manner that the opportunity for fraudulent practices will be reduced to an absolute minimum.

S. Rep. No. 1170, 74th Cong., 1st Sess. 3 (1935).

SECTION 1648

Section 1648 is not directed to brokers but rather deals with the subject of methods of payment of duties. In contrast to the authority of the Secretary in connection with other types of tax obligations, Congress has never allowed the Secretary to accept uncertified checks tendered in payment of import duties except under certain

conditions. Section 1648 was enacted to liberalize the Secretary's authority, which had been more rigidly circumscribed, and reads in its entirety:

> Customs officers may receive uncertified checks, United States notes, and circulating notes of national banking associations in payment of duties on imports, during such time and under such rules and regulations as the Secretary of the Treasury shall prescribe but if a check so received is not paid the person by whom such check has been tendered shall remain liable for the payment of the duties and for all legal penalties and additions to the same extent as if such check had not been tendered.

The trial court held that the above authority of the Secretary with respect to regulating methods of payment was restricted by the requirement of section 1641, with respect to licensing brokers, that the Secretary *shall* issue regulations which protect importers. The mandatory language "*shall*" in section 1641(d) was controlling, per the trial court, with respect to the regulations under section 1648, and made the Secretary's interpretation of 19 C.F.R. § 24.1(3) issued under section 1648 illegal. We disagree that the Secretary's authority under section 1648 is so circumscribed.

While the trial court correctly noted the words of section 1648(d) that the Secretary shall prescribe regulations to protect the importer, the court failed to take into account that the Secretary has been given wide discretion in deciding the scope of such regulations. Congress did not direct that the regulations must protect importers from all improvident or malicious acts of brokers. Rather it provided that the Secretary shall prescribe such regulations "as he may deem necessary to protect importers and the revenue of the United States." The words "as he may deem necessary" indicate that Congress intended to restrict judicial interference with the Secretary's exercise of his power. *See Young* v. *Community Nutrition Institute,* 106 S. Ct. at 2364–65.

The trial court also misconstrued the Congressional intent expressed in section 1641. Section 1641, in its entirety, does not require that the Secretary protect each importer from a particular financial loss or injury by a particular broker. Section 1641 contemplates the withdrawal of licenses only *after* misconduct.[4]

Section 1641 imposes no obligation on the government to advise all importers or any particular importer that a particular broker is

[4] Cometals argues that its broker, Loudon, was initially or became the agent of the government, and that Cometal's payment to the broker, therefore, constituted payment to the government. The theory that a broker is an agent of the government because the broker may operate only after obtaining a government license is again rejected. *See E.H. Carrigan* v. *United States,* 35 CCPA 10 (1947). The broker licensing program is designed to provide a substantial measure of protection to the public with whom brokers deal. But a broker is in a position no different from any other professional or skilled person who may legally operate only under a government license, for example, a registered patent attorney. The grant of such license represents to the public simply that certain minimum requirements necessary to practice their profession have been shown to be satisfied. It does not constitute a representation by the government that the broker will on all occasions properly handle the business of a client. Nor does misconduct somehow convert the broker to the agent of the government.

in a possibly shaky financial condition. Either a broker is licensed or he is not.[5]

As indicated in the legislative history, these statutory provisions are designed to protect the importing community by giving the Secretary the power to regulate the conduct of brokers and to reduce, thereby, the possibility of fraud to a minimum. The government, by granting a license and by having the power to withdraw that privilege, is not obligated to become the guarantor of each transaction conducted by a broker. Nothing in the legislative history leads to a contrary conclusion. Nor must the Secretary provide in 19 C.F.R. § 24.1(3) that the broker must post his own bond for his uncertified check. Such a requirement would conflict with the flexible authority intended to be conferred by 19 U.S.C. § 1648.

The trial court mistakenly found support for its view in the following language of section 1648, "[I]f [an uncertified] check so received is not paid the person by whom such check has been tendered shall remain liable for the payment of the duties * * *." The trial court reasoned that since the broker tendered the check, the broker remained liable and therefore, the broker's bond had to be on file to meet his obligation. The court erred, however, in its understanding of the meaning of this provision. The provision that the person tendering the check "shall remain liable" has no applicability to the broker. The broker was *never* liable to the government for the duties. Thus, under section 1648, the broker cannot "remain" liable for duties for which it was never liable.

The trial court also incorrectly concluded that if the regulation did not require that the bond be that of the broker, it "would allow the bond of the importer to protect the legal obligation of the broker * * *." This analysis is backwards. It is the importer who has the legal obligation to the government to pay the duties, and the bond protects the legal obligation of the importer.[6] The trial court confused obligations between the broker and the importer with obligations of the importer to the government.

In view of the above considerations, we hold that the Secretary's interpretation of 19 C.F.R. § 24.1(3) is reasonable and that acceptance of Loudon's uncertified check in reliance on Cometals' bond was not a violation of the statute or the regulation.[7]

The basis for the trial court's holding on equitable estoppel being erroneous as a matter of law, the judgment cannot stand.

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[5] It is inconceivable to the majority that the government could be held under an obligation to warn importers away from a broker who is licensed, or may publicly disclose a broker's financial condition. Section 1641(b) is designed to provide a large measure of protection for brokers. The suggestion that the government must warn prospective clients against a broker would circumvent these safeguards and must be unequivocably rejected.

[6] This premise is clearly supported by 19 C.F.R. § 141.1(b) (1980) which states:

> (b) Personal debt of importer. The liability for duties, both regular and additional, attaching on importation constitutes a personal debt due from the importer to the United States which can be discharged only by payment in full of all duties legally accruing, unless relieved by law or regulation. It may be enforced notwithstanding the fact that an erroneous construction of law or regulation may have enabled the importer to pass his goods through the customhouse without such payment.

See also Meredith v. *United States*, 38 U.S. (13 Pet.) 486, 493 (1839) (import duties constitute a personal debt due to the United States from the importer).

[7] The artificiality of this entire analysis based on 19 C.F.R. § 24.1(3) is illustrated by the fact it can be raised in this case only because the broker issued his check. If the broker had not done so, the foundation for the argument simply disappears.

IV

For the foregoing reasons, the judgment of the Court of International Trade holding that the government is equitably estopped from collecting duties owed by the importer Cometals and its surety is reversed. The case is remanded for entry of a judgment on liability in favor of the government and such further proceedings as are consistent with this opinion.

REVERSED AND REMANDED

(Appeal No. 85–2343)

UNITED STATES, APPELLANT, *v.* FEDERAL INSURANCE COMPANY AND COMETALS, INC., APPELLEES

NEWMAN, *Circuit Judge,* dissenting.

I respectfully dissent.

In this case of neglect of duty by government agents in administering a statute enacted for the purpose of protecting importers and the United States against the notorious potential for abuse by customhouse brokers, the trial court had sound basis for invoking the doctrine of equitable estoppel. The majority's opinion pays scant deference to the facts as found by the Court of International Trade, none of which the majority finds to be clearly erroneous.

Appellate review of an equitable judgment requires not only attention to the specific abuses that led the court to impose an equitable remedy; but more, it requires appropriate deference to the discretionary authority with which trial judges are invested. Trial courts "in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' " *United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 607–08 (1956) (quoting *International Salt Co.* v. *United States,* 332 U.S. 392, 400–01 (1947)). *See also Curtiss-Wright Corp.* v. *General Electric Co.,* 446 U.S. 1, 10 (1980) ("the discretionary judgment of the district court should be given substantial deference"). The basis for our review of the decision of the Court of International Trade is whether the court abused its discretion in imposing equitable estoppel, on the uncontested facts of this case. See *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 424 (1975) in which, in directing the Fourth Circuit as to the standard to apply to the district court's determination of whether respondents were entitled to the equitable remedy of backpay, the Supreme Court stated:

> [T]he standard of review will be a familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion to locate "a just result" in light of the circumstances peculiar to the case
> * * *

See also Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702, 729 (1978) (Marshall, J., concurring in part and dissenting in part).

A trial court's exercise of equitable discretion based on specific circumstances is the acme of the judicial obligation to do justice under law. It is not defeasible by generalities as to the absolute right of the sovereign to extract monies from citizens—a right that is not absolute, as this nation declared in 1776. The government is subject to minimal standards of responsibility in dealing with the public, whether the matter at issue is customs duties or any other impost on the public.

In holding the United States estopped, the trial court, expert in customs law, invoked the policy behind the law that the government had failed to administer. The trial court declined to excuse the government from the consequences of this failure. Viewed another way, the trial court refused to penalize the innocent importer by requiring the importer to pay the duty of $230,334.12 twice, when government lapse was a significant factor in the event.

The trial court recognized, as had Congress when the current law controlling customs brokers was enacted, the unusual role of customhouse brokers in the customs business:

> [I]n view of the fact that these customhouse brokers are quasi-officers of the Treasury and that by licensing them the Treasury holds out to importers that it has investigated their character and represents to such importers that they are capable and honest in their conduct of their customs business * * *.

Cong. Rec. 13,356–57 (1935) (statement of Senator Walsh). *See also* S. Rep. No. 1170, 74th Cong., 1st Sess. 3 (1935).

As the trial court remarked, Loudon's history of bad checks and negative net worth was well known to the Customs Service. The legislative history shows that the regulation of customs brokers was designed to protect "both importers and the revenue of the United States". Cong. Rec. 13,387 (1935). Congressman Crowther reiterated that customs brokers are

> pseudo Federal officers in the sense that they handle the customs revenue as between the Government and the importer * * *

Cong. Rec. 14,577 (1935), and that in light of their "peculiar relation" to the federal government, the Treasury Department

> ought to have complete authority for a thorough examination of their transactions in order to end this racketeering and depleting of the revenue of the Government of the United States.

Id. This authority was enacted by statute:

REGULATIONS BY SECRETARY

> The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary *to protect importers and the revenue of the United States,* and to carry out the provisions of this section, including rules and regulations requiring the keeping of books, accounts, and records by customhouse brokers, and the inspection thereof * * *. [Emphasis added]

19 U.S.C. § 1641(d).

Pursuant to this authority the Treasury examined Loudon's finances. A government audit in October 1977 revealed that Loudon's liabilities exceeded his assets by over $164,000, and that he was responsible for more than $190,000 in overdrafts. This in itself violated the standards for licensed brokers. In late 1979 and early 1980 six of Loudon's uncertified checks, some covering Cometals' entries, were dishonored and returned to the Customs Service on the basis of insufficient funds. The Customs Service never advised the importer of these events. Although Loudon eventually covered these checks, the government's blind eye to Loudon's style was inimical to its statutory responsibility.

Despite its knowledge of Loudon's negative net worth and its experiences with Loudon's bad checks, the Customs Service conducted no audit after 1977 of Loudon's financial condition, took no action in connection with Loudon's license, required no bond from Loudon, and did not tell the importer when its broker's checks were dishonored. Nothing whatsoever was done to protect either the importer or the United States, as required by statute. The trial court held that the government was equitably estopped, by these actions, from recourse against Cometals in this case.

Despite long-standing congressional and judicial recognition of the pragmatic role of customhouse brokers as "quasi-officers of the Treasury", the majority erases this history by its fiat that Loudon was a "mere agent" of the importer. The past is not so easily changed. Indeed, the term "broker" itself connotes other than a simple agency relationship.

The trial court discussed its reasons for holding that customs brokers are not simply agents of the importer. But even on agency principles, the Customs Service failed in its obligations to the "principal" it now seeks to hold liable. The Customs Service never notified Cometals of its purported agent's bounced checks, neither in this case nor in prior importations where Loudon's checks for Cometals' duties were not honored.

> Third party disclosure to an agent is not imputed to the principal when the agent is acting adversely to the principal's interest and the third party has notice of this.

Arlinghaus v. *Ritenour,* 622 F.2d 629, 636 (2nd Cir.), *cert. denied,* 449 U.S. 1013 (1980). *See also* Restatement (Second) of Agency § 271

(1958). The detrimental reliance element of estoppel, *e.g.*, *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 59 (1984), was exacerbated by this silence. Further, any agency relationship between Loudon and Cometals vanished when Loudon comingled funds and diverted payments:

> [T]he authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or is otherwise guilty of a serious breach of loyalty to the principal.

Restatement, *supra*, § 112. The government knew of these adverse interests, and has not denied its knowledge of Loudon's financial practices. By the government's admissions, any agency authority was terminated by its and Loudon's actions adverse to Cometals' interest.

Cometals argued before the trial court that the Customs Service, in its tolerance of Loudon's misfeasances and in its failure to notify Cometals when the checks for Cometals' duties were dishonored, acted in a way that protected Loudon while prejudicing the importer. The government concedes in its brief that "there is no evidence on the record that the importer or surety were even aware that uncertified checks were being accepted". Loudon's bankruptcy ended a pattern of what Cometals describes as "kiting", facilitated by governmental violation of its own regulations.

The trial court was entitled to consider these circumstances in reaching its equitable decision. They can not be glossed over. The government argues that it was entitled to continue to process Loudon's succession of bad checks without advising the importer, even as it now seeks to hold the importer responsible for this clearly preventable occurrence.

The government argues that it accepted Loudon's uncertified check in this case because of Cometals' surety bond, but this is a different issue. I do not see how the presence of Cometals' bond is a sufficient excuse for the government's laxness, if not acquiescence, in Loudon's financial footwork when the Treasury regulations require the government to license only financially sound customs brokers. In view of the government's failure to meet its minimal regulatory obligations, it can not now argue that the statute

> 19 U.S.C. § 1648 * * * [I]f a check so received is not paid the person by whom such check has been tendered shall remain liable for the payment of the duties * * *

means not only the maker who tenders the check but the importer as well. The plain language of the statute excludes so expansive a reading. The statute itself accommodates the ever-present customs broker, and his complex relationship in such transactions.

Cometals' surety company bonded Cometals, not Loudon. The majority interprets Cometals' bond as Cometals' surety's acceptance of liability to the government for Loudon's diversion of the monies.

The majority holds that because of the bond the government had no obligation to enforce its own regulations, or even to exercise minimal due care in its dealings with Loudon and particularly in its dealings with importers. The Court of International Trade held that the Customs Service was chargeable with "affirmative misconduct" in not requiring a bond of Loudon and in failing to audit and determine his financial responsibility, as the law and Treasury regulations require. On this record, the imposition of equitable estoppel is supported by precedent.

Equitable estoppel against the government is imposed only in egregious circumstances, wherein to hold otherwise is offensive to one's sense of justice. The Supreme Court in *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 60–61 (1984), concluded that it would not

> say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some *minimum standard of decency, honor and reliability* in their dealings with their Government. [Emphasis in original and added]

The Court in *Community Health Services* discussed various examples of governmental misconduct in which equitable estoppel was denied or granted depending on the facts, including *Immigration and Naturalization Service* v. *Miranda*, 459 U.S. 14, 17, 19 (1982) ("The Court of Appeals thus correctly considered whether as an initial matter, there was a showing of affirmative misconduct."); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981) (" 'It is the duty of all courts to observe the conditions defined by Congress for charging the public treasury.' ") (quoting *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947)). 467 U.S. at 60 n.12.

The Court in *Community Health Services* stated that "at least two of our cases seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of government deception." *Id.* (citing *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 675 (1973) (evidence of misleading information by government is pertinent to defense of whether it was reasonable to rely thereon); and *Moser* v. *United States*, 341 U.S. 41, 47 (1951) (finding "misleading circumstances" the Court held that "elementary fairness" required estoppel)).

There are varied circumstances in which equitable estoppel has been imposed by the courts against the government. Among the circuits, see, *e.g.*, *Meister Brothers, Inc.* v. *Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982) ("the 'public has an interest in seeing its government deal carefully, honestly and fairly with its citizens' ") (quoting *United States* v. *Wharton*, 514 F.2d 406, 412–13 (9th Cir. 1975); *Corniel-Rodriguez* v. *Immigration and Naturalization Service*, 532

F.2d 301, 307 (2d Cir. 1976) (refusing "to sanction a manifest injustice occasioned by the Government's own failures"); *United States* v. *Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973) ("estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel"); *Brandt* v. *Hickel*, 427 F.2d 53, 56 (9th Cir. 1970) ("some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped"); *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92, 103 (9th Cir. 1970) ("the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case"). The Court of Claims has held similarly, see *Emeco Industries, Inc.* v. *United States*, 485 F.2d 652, 657 (Ct. Cl. 1973) (government not immune from estoppel where its denial would be " 'contrary to equity and good conscience' ") (quoting *Stevens Manufacturing Co.* v. *United States*, 8 F. Supp. 720, 724, 80 Ct. Cl. 183, 192–93 (1934)).

In *Air-Sea Brokers, Inc.* v. *United States*, 596 F.2d 1008 (CCPA 1979), the Court of Customs and Patent Appeals stated that equitable estoppel could not be applied against the government in cases involving import duties, based on its view of the distinction between governmental action in a sovereign capacity as opposed to a proprietary capacity, *id.* at 1011, a distinction inapt in the case at bar, as illustrated in the CCPA's reference to *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957), a tax case which held that the Commissioner was not estopped from correcting an error of law and thereby requiring payment of past taxes, *id.* at 1101 n.8. In neither *Air-Sea Brokers* nor *Automobile Club* did the trial court find that there was affirmative misconduct; nor did the trial court in either case, in its equitable discretion, determine that the facts of the case warranted the application of the doctrine of equitable estoppel. Appropriately in view of the limited standard of review with respect to such issues, see discussion *ante*, each appellate court and in *Automobile Club* the Supreme Court affirmed. Therefore, unlike the situation now before us, in *Air-Sea Brokers* and *Automobile Club*, imposts were required to be paid rather than waived in their entirety.

The Court of International Trade thus declined to apply the CCPA's sweeping dictum, stating correctly that its holding does not "sanction *all* possible government misconduct in the area of duty collection, particularly when it displays a blatant disregard for the public interest in a matter of utmost importance." 605 F. Supp. at 304 (emphasis in original).

As is made clear in the extensive precedent in which courts have considered governmental conduct, whether the government can be estopped depends on the nature of both the governmental action and the governmental misconduct. The trial court referred to the general rule that " 'laches or neglect of duty on the part of officers

of the Government is no defense to a suit by it to enforce a public right or protect a public interest' ", 605 F. Supp. at 303–04 (quoting *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917)), a rule tempered by judicial determination of whether the government met a "minimum standard of decency, honor, and reliability", in the words of *Community Health Services*. In balancing these factors, the courts are obliged to administer laws fairly, even when the government is a party. Neither the government nor its citizens is relieved from the omnipresent obligation to "turn square corners" with the other. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting), *quoted in Community Health Services*, 467 U.S. at 51 n.13; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 387–88 (1947) (Jackson, J., dissenting).

Equitable estoppel is not legal estoppel: it is the fruit of the search for justice in an often complex balance of interests, rights, and authorities. The laws requiring federal regulation of customhouse brokers were designed to protect both importers and the treasury, as is clear from the legislative history. Balancing the equities as between these two entities with respect to the circumstances at bar, the Court of International Trade brought its wisdom and experience in customs law and practice. None of the decisions cited by the government or relied on by the majority is contravened by the trial court's conclusion in this case. The decision of the Court of International Trade is supported by law and precedent and is in the interest of justice.

The Treasury changed its regulations in 1982, by requiring customs brokers to advise importers in writing that importers may pay customs duties directly to the United States rather than to the broker, and that payment to the broker does not relieve the importer of liability. 19 C.F.R. § 111.29(b)(1). This change reinforces the view that the prior regulations and practices were notably imperfect. The trial court's decision is not contrary to law nor an abuse of its equitable discretion, and should not be disturbed.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–111)

CHANNEL MASTER, DIV. OF AVNET, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–5–00802

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff protests the classification of "scanners" as "other solid-state (tubeless) radio receivers," under items 685.23 or 685.24, TSUS. Plaintiff contends that the merchandise is properly classifiable as other radio broadcasting reception apparatus, under item 685.25, TSUS.

Held: Pursuant to Rule 10(h) of the General Headnotes to the Tariff Schedules, the merchandise was properly classified by the Customs Service as unfinished radio receivers.

[Judgment for defendant; action dismissed.]

(Decided October 29, 1986)

Fitch, King & Caffentzis (*Richard C. King*), for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* International Trade Field Office (*Saul Davis*), for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the customs invoice as "scanners," which were imported during the years 1974, 1975, 1976, and 1977.

The merchandise was classified by the Customs Service as "other solid-state (tubeless) radio receivers," under items 685.23 or 685.24 of the Tariff Schedules of the United States (TSUS), depending upon the date of importation. Consequently, the merchandise was assessed with duty at a rate of 10.4 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable as other radio broadcasting reception apparatus, under item 685.25, TSUS, at a rate of 6 per centum ad valorem.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 6, Part 5:

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, * * *: all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:

* * * * * * *

Radiotelegraphic and radiotelephonic transmission and reception apparatus: radiobroadcasting and television transmission and reception apparatus, and parts thereof:

Other:

685.23—Solid-state (tubeless) radio receivers ..... 10.4% ad. val.

[685.24—Other .....10.4% ad. val.]

Claimed under:

685.25—Other ..... 6% ad. val.

The question presented is whether the imported merchandise is dutiable as "other solid-state (tubeless) radio receivers," as classified by Customs, or as other radio broadcasting reception apparatus, as claimed by plaintiffs. In order to decide this issue, the Court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 2 Fed Cir. 70, 75, 733 F.2d 873, 878 (1984).

After an examination of the merchandise, the pleadings and supporting papers, and relevant case law, it is the determination of the Court that plaintiff has not overcome the presumption of correctness that attaches to the government's classification, and the action is dismissed. 28 U.S.C. § 2639(a)(1) (1982); *Jarvis Clark Co.* v. *United States,* 2 Fed. Cir. at 72, 733 F.2d at 876; *E.R. Hawthorne & Co.* v. *United States,* 1 Fed. Cir. 42, 52, 730 F.2d 1490, 1490 (1984).

Three different types of scanners were imported, each designed to receive assigned frequencies for various radio services, such as police, fire, and other municipal broadcasts. Because the frequencies for these services vary in each town or city, different crystals allow the user to tune into the desired frequencies of the particular area.

The two smaller scanners, Models CS6258 and CS6790, are completely solid-state, VHF-FM dual conversion portable receivers, and are capable of automatically switching four crystal-controlled channels. These models can be powered either by four "penlight" batteries, or through the use of the external powersocket, which allows the units to be operated from any convenient AC outlet with the use of an optional AC-adaptor. The larger scanner, Model CS6794, is

a solid-state, dual conversion FM receiver designed to monitor public service broadcasts. This receiver features 10 channels which can be selected manually or automatically. Model CS6794 can be powered by either an AC outlet or a car battery.

All three scanners require one crystal for each frequency that the user wishes to operate. The crystals may be purchased from a retail dealer, or from the crystal manufacturer, and may be inserted by the owner of the unit. The amount of time and effort necessary to complete the imported scanners into fully operable receivers is governed by the amount of time required by the user to remove the rear compartments, and to insert the crystals into the correct position.

In challenging the Customs Service's classification of the scanners, it is plaintiff's contention that the units do not fall within the common meaning of the *eo nomine* term "radio receiver," and that Rule 10(h) does not apply in this case.

The defendant contends that the "Customs Service classified these scanners as radio receivers, as they were at least unfinished radio receivers by virtue of Rule 10(h)." Rule 10(h), which has general applicability to the tariff schedules, provides:

> unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished.

19 U.S.C. § 1202 General Headnotes and Rules of Interpretation 10(h)(1982).

In order to determine whether the imported scanners are unfinished radio receivers, the court must ascertain the common meaning of "radio receivers," as that term is used by Congress in the tariff schedules. The meaning of a tariff term "is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary." *Bentkamp* v. *United States,* 40 CCPA 70, 78, C.A.D. 500 (1952), *quoted with approval in Rohm & Haas Co.* v. *United States,* 727 F.2d 1095, 1097 (Fed. Cir. 1984).

A radio receiver, as that term is used in the tariff schedules, is an *eo nomine* designation for an article which has been lexicographically and judicially defined as capable of performing three basic functions: selectivity, amplification, and detection. *See NEC America, Inc.* v. *United States,* 8 CIT 184,187, 596 F. Supp. 466, 470 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985); *General Electric Co.* v. *United States,* 2 CIT 84, 90, 525 F. Supp. 1244, 1248 (1981), *aff'd,* 69 CCPA 166, 681 F.2d 785 (1982). Absent contrary legislative intent, an *eo nomine* designation includes all forms of the article. *B & E Sales Co.* v. *United States,* 9 CIT ——, Slip Op. 85–22 (1985).

Selectivity is defined as the ability to select a particular frequency from radio signals in the atmosphere. Amplification is the process of increasing the radio frequency energy received by the antenna so that it can be used to generate a signal. Detection is the proc-

ess by which the radio frequency waves are converted into a signal that can be utilized.

In *General Electric Co.* v. *United States,* 2 CIT 84, 525 F. Supp. 1244 (1981), *aff'd,* 69 CCPA 166, 681 F.2d 785 (1982), pursuant to item 685.23, TSUS, Customs classified certain imported "electronic packs" as unfinished radio receivers. Plaintiff contended that the electronic packs were merely parts of radio receivers, since they were missing "significant and substantial parts," such as a power transformer, power cord, and loudspeaker. Defendant responded that "the chassis were capable of performing the basic functions of a 'radio receiver' within the common meaning of that term," and that the classification was proper. *Id.* at 87, 525 F. Supp. at 1246. The court determined that "the basic functions of a radio receiver are selection, amplification, and detection." *Id.* The court also determined that the absence of the components did not preclude the application of Rule 10(h). Accordingly, the court held that the merchandise was substantially complete, and was properly classified as unfinished radio receivers. On appeal, the United States Court of Customs and Patent Appeals affirmed, and adopted the opinion of the Court of International Trade. *See* 69 CCPA 166, 167, 681 F.2d 785, 786 (1982).

In *NEC America, Inc.* v. *United States,* 8 CIT 184, 596 F. Supp. 466 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985), the Customs Service classified imported battery-operated paging receivers as "other solid-state (tubeless) radio receivers," under item 685.24, TSUS. Plaintiff protested this classification, and contended that the merchandise was properly classifiable under item 685.70, TSUS, as "indicator panels and other sound or visual signalling apparatus." Defendant maintained that the pagers were properly classified as "radio receivers" because they performed the basic functions of selection, amplification, and detection. The court sustained the classification, and, relying in part on the *General Electric* case, held that since the paging receivers were capable of performing those basic functions, the paging receivers were properly classified under item 685.24, TSUS, as radio receivers.

In the present case, the parties have stipulated that the scanners, as imported, do not "have the ability" to perform selection or detection. The scanners, however, do have all the necessary circuitry to perform these functions, and all that is missing from the units that prevents full operation as a radio receiver are the frequency crystals. Moreover, each scanner has a ceramic filter which permits "excellent selectivity." The parties also stipulated that, after the crystals are inserted, the scanners can operate to receive radio broadcasts. Plaintiff contends that since the scanners, as imported, cannot perform the three basic functions of a radio receiver, they do not come within the *eo nomine* meaning of a radio receiver. It cannot be denied, however, that once the appropriate crystals are in-

serted, the scanners can perform these three basic functions of selection, amplification, and detection.

It must be noted at the outset that classification under item 685.24, TSUS, is not restricted to articles that are finished, and that it has been held to encompass articles that are unfinished. *See General Electric Co.* v. *United States,* 2 CIT 84, 90, 525 F. Supp. 1244, 1248 (1981) (classification of merchandise as unfinished radio receivers), *aff'd,* 69 CCPA 166, 681 F. 2d 785 (1982). To ascertain whether an article can be classified as unfinished under Rule 10(h), the court must determine if the merchandise is "substantially complete." *Authentic Furniture Products, Inc.* v. *United States,* 68 Cust. Ct. 204, 211 (1972), *aff'd,* 61 CCPA 5, C.A.D. 1109, 486 F.2d 1062 (1973); *see Daisy-Heddon, Div. of Victor Comptometer, Corp.* v. *United States,* 66 CCPA 97, 600 F.2d 799 (1979).

In the *Authentic Furniture Products* case, the question presented was whether certain unassembled pieces or parts of wooden bunk beds had been properly classified by the Customs Service as parts of furniture, under item 727.40, TSUS. Plaintiff contended that the imported merchandise was properly classifiable as furniture, under item 727.35, TSUS. Since the tariff definition of "furniture" expressly included "beds," plaintiff asserted that, pursuant to Rule 10(h), the unassembled pieces of wooden bunk beds should have been classified as furniture.

Defendant maintained that the imported merchandise was "neither 'beds' nor 'bunk beds' because [it did] not contain a 'bedframe and a bottom.' " The importations lacked "siderails," and defendant stated that "without siderails, the imported pieces cannot even be assembled so that they will stand in an upright position." The court held that "since the imported pieces, when assembled, would not constitute a substantially complete bunk bed," they could not be classified as "unfinished furniture," and, therefore, had been properly classified as parts of furniture. The Customs Court reviewed the relevant judicial authority and concluded:

> That parts of an article are classifiable as the article itself only if the article, as imported, is substantially complete, appears to be a reasonable application of General Interpretive Rule 10(h).

68 Cust. Ct. at 215, 343 F. Supp. at 1380. On appeal, the Court of Customs and Patent Appeals affirmed. 61 CCPA 5, C.A.D. 1109, 486 F.2d 1062 (1973).

In affirming the decision of the Customs Court, the Court of Customs and Patent Appeals stated that there was "no error in the lower court's holding that parts of an article may be classified as the unfinished article itself only when the imported pieces constitute a substantially complete article * * *." 61 CCPA at 6, 486 F.2d at 1063. Hence, it cannot be disputed that the court "approved" of the test set forth by the Customs Court in the *Authentic Furniture Products* case. Although the appellate court, in a separate portion of

its opinion, rephrased the test to be whether "the absence of a substantial or essential part precludes classification as the unfinished article itself," there is no question that the test applied by the Customs Court did not include the word "essential." Indeed, in *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States,* 66 CCPA 96, 600 F.2d 799 (1979), the Court of Appeals expressly rejected the language which referred to absence of an "essential" part. *Id.* at 102, 600 F.2d at 802.

In the *Daisy-Heddon* case, the Court of Customs and Patent Appeals stated:

> the result in *Authentic Furniture Products* does not merely depend on the "essential" nature, be it functional or commercial, of the omitted [parts]. It is abundantly clear from the opinion of the Customs Court, which was approved by this court, that the basis of the decision in that case was that "it is the determination of this court that the importations do not constitute a substantially complete article."

66 CCPA at 102, 600 F.2d at 801.

In addition, the appellate court identified five of the more common factors that are relevant in determining whether the imported merchandise is substantially complete:

> (1) Comparison of the number of omitted parts with the number of included parts;
> (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and, (5) trade customs, i.e. does the trade recognize the importation as an unfinished article or as merely a part of that article.

Daisy-Heddon, 66 CCPA at 102, 600 F.2d at 803. This list, although not intended to be exclusive, offers guidelines that are helpful in resolving the classification question which depends upon whether the article is substantially complete. *Id.*

An example of the application of the *Daisy-Heddon* factors may be found in the case of *Swift Instruments, Inc.* v. *United States,* 4 CIT 88, 554 F. Supp. 1235 (1982), *aff'd,* 714 F.2d 161 (Fed. Cir. 1983). In the *Swift Instruments* case, the question presented was whether certain microscopes, imported without lenses, were properly classified as "unfinished compound optical microscopes," under items 708.71–.73, TSUS. Plaintiff asserted that, under the criteria set forth in the *Daisy-Heddon* case, the merchandise was not substantially complete, and should have been classified as "frames and mounting, and parts" of compound optical microscopes, under item 708.80, TSUS. Defendant contended that, under Rule 10(h), notwithstanding that the microscopes lacked optical components, the mer-

chandise was, nevertheless, substantially complete and, therefore, was properly classified as the unfinished article. The court found that the imported merchandise was substantially complete, and held that the merchandise was properly classified. In affirming the classification, the court noted that the "essential part" rule had been expressly rejected in *Daisy-Heddon*, and stated that "omission of lenses essential to the functioning of the completed microscopes * * * does not preclude a determination that the imported components were substantially complete." *Id.* at 93, 554 F. Supp. 1239. On appeal, the Court of Appeals for Federal Circuit affirmed, without opinion. 714 F.2d 161 (Fed. Cir 1983).

In this case, after consideration of the *Daisy-Heddon* factors, the Court has concluded that the imported scanners are substantially complete radio receivers and, therefore, are properly classifiable as unfinished radio receivers. The stipulated facts disclose that the two four-crystal scanners have over 135 parts, and the four crystals and four batteries total eight additional parts to be added before the scanner is fully operational. The 10-crystal scanner has over 175 parts as imported, and requires 10 crystals to be fully operational. It is clear that the number of parts to be added to each scanner is small in comparison with the large number of parts already included in the imported merchandise. Clearly, this is an important factor that would indicate that the scanners are substantially complete.

The time and effort necessary to convert or complete the imported scanning receivers into operational receivers are insignificant compared to the time and effort required to place the scanners in their condition as imported. Once the scanners are purchased, all that the owner need do is to remove the rear compartment of the scanner, and insert the crystals and batteries into the appropriate positions. Surely, this simple function requires a minimal amount of time and effort, and is all that is required to make the imported scanner receivers fully operational.

The evidence also shows that the cost of the omitted parts is small in comparison to the cost of the imported article, and supports the defendant's contention that the goods are substantially complete. The cost of the omitted parts constitutes 16 percent of the cost of model CS9258, 14 percent Model CS6790, and 23 percent of model CS6794. Although these percentages are not insignificant, they are sufficiently low to support the conclusion that the scanners, as imported, are substantially complete receivers.

It is undisputed that the crystals are necessary to the use of the scanner as a radio receiver. This, however, does not prevent the scanners from being unfinished receivers pursuant to Rule 10(h) and the *Daisy-Heddon* criteria. Plaintiff urges that the crystals, which allow the scanners to perform as radio receivers, are the "heart" of the radio, and that without them the scanners cannot properly be classified as radio receivers. This contention is unpersuasive, and is not the heart of the classification question presented.

Although the crystals are necessary to permit the scanner to operate, the crystal is merely one of numerous other components, all of which enable the scanners to perform the basic functions of a radio receiver. The scanners as imported contain circuits designed to select particular frequencies, circuits designed to detect radio information, and a speaker which allows for amplification of the signals into perceptible sounds. In addition, as the instruction manuals describe, each scanner contains a "Monolithic crystal filter and ceramic filter for high sensitivity and high selectivity." Just as the crystals may be essential to the scanner, so are the circuits, filters, and speaker.

In determining whether an article is an unfinished article under Rule 10(h), the question is whether the article is "substantially complete," not whether it lacks an "essential" part. Under *Daisy-Heddon*, a factor to be considered is "the significance of the omitted parts to the overall functioning of the completed article. This, however, is merely one of the factors to be considered by the court, and does not establish an "essential part" test to determine whether an article is "substantially complete." Any doubt as to the meaning of this factor in the totality of the *Daisy-Heddon* factors is resolved by an understanding of the *Swift Instruments* case. In *Swift Instruments*, even though the lenses, which were essential to the functioning of the microscopes, were omitted, this fact did "not preclude a determination that the imported components were substantially complete." 4 CIT at 93, 554 F. Supp. at 1239. Consequently, in this case, the Court finds that the absence of the crystals does not preclude the imported scanners from being substantially complete, and being classified under item 685.23 or 685.24, TSUS, as unfinished radio receivers.

In view of the application of Rule 10(h), and the relevant case law, the Court finds that the merchandise is substantially complete, and that the presumption of correctness that attaches to the government's classification has not been overcome. Since the Court holds that the imported scanners have been properly classified as "other solid-state (tubeless) radio receivers," under items 685.23 or 685.24 of the tariff schedules, plaintiff's protest is denied, and the action is dismissed. Judgment will issue accordingly.

(Slip Op. 86–112)

NATIONAL CORN GROWERS ASSOCIATION ET AL., PLAINTIFF *v.* JAMES A. BAKER III ETC. ET AL., DEFENDANTS

Court No. 85–08–01151

MEMORANDUM & ORDER

[Motion of intervenor-defendant Citicorp International Trading Company, Inc. for rehearing denied.]

(Dated November 3, 1986)

Williams & Connolly (Aubrey M. Daniel, III, Stephen L. Urbanczyk, Manley W. Roberts, Robert W. Hamilton and *William R. Murray, Jr.)* for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice *(Kenneth N. Wolf)* for the defendants.

Spriggs, Bode & Hollingsworth (William H. Bode, Donald W. Fowler, Joseph A. Artabane, Mark J. Reidy, and *Bruce J. Berger)* for intervenor-defendant RAJ Chemicals, Inc.

Wilmer, Cutler & Pickering (A. Douglas Melamed, Robert C. Cassidy, Jr. and *Deborah M. Levy)* for intervenor-defendant Citicorp International Trading Company, Inc.

AQUILINO, *Judge:* Subsequent to entry of final judgment herein, intervenor-defendant RAJ Chemicals, Inc. ("RAJ") interposed a Motion for Reassignment to Three-Judge Panel and Motion for Rehearing or to Alter and Amend Judgment. The simultaneous motion(s) were addressed to the Chief Judge of the Court pursuant to Rule 77(d)(2) and (4) and Rule 59.[1] Intervenor-defendant Citicorp International Trading Company, Inc. ("Citicorp") then filed with the undersigned a Motion for Rehearing and to Alter, or for Relief From, Judgment. That filing was characterized "as a formality, within the thirty days specified in Rules 59 and 60, in order to ensure that no question can be raised about the timeliness of [Citicorp's] suggestion that it is entitled to the same relief from the earlier Judgment in this case as RAJ."

The Chief Judge has denied RAJ's motion(s) in Slip Op. 86–80, 10 CIT ——, 643 F.Supp. 626 (1986), which concludes as follows:

> * * * Because reassignment of the case at this juncture would likely protract the ultimate disposition of the action, the action will not be reassigned.
>
> In this case, the parties have raised a number of issues that may be subject to appeal * * *. Although the parties may not file a notice of appeal while a motion for rehearing is pending, there is no reason to believe that any party who feels aggrieved will not appeal any adverse judgment * * *.
>
> The single-judge court has entered a stay of judgment to maintain the status quo pending disposition of the motion for rehearing and disposition of the appeal. Hence, it is the determination of the Court that the interests of justice can best be served by having all issues finally resolved on appeal in one fo-

[1] Citicorp submitted papers to the Chief Judge in support of RAJ's position.

> rum as expeditiously as possible * * *. 10 CIT at ——, 643 F.Supp. at ——.

The form order submitted in conjunction with the Citicorp motion for rehearing proposes deletion of that part of the court's judgment which orders Citicorp to

> remit to the United States * * * duties equal to the rate provided under items 427.88 and 901.50, TSUS on any of its entries of fuel ethanol from Brazil at issue in this case which have already been liquidated at a different rate of duty.

Apparently by the time of this decree, Customs had liquidated[2] all four contested Citicorp ethanol entries at the incorrect rate of duty. However, in letters dated July 28 and October 22, 1986, defendant's counsel have notified the court of reliquidation of two of those entries "under authority of 19 U.S.C. § 1501" at the lawful rate. Presumably, but for the provision in that section of the Tariff Act that such reliquidation be carried out within 90 days of the date of original liquidation, the Service itself would have also imposed the correct rate on the other two entries.

In its motion(s), RAJ argued that section 1501 is the "only exception" to the provisions of 19 U.S.C. § 1514(a) "possibly applicable in this action".[3] Suffice it to state for purposes of Citicorp's motion that the court, in rendering its decision of May 22, 1986, 10 CIT ——, 636 F.Supp. 921, carefully considered the purview of section 1514 and concluded that Congress, in enacting that provision to protect imports from arbitrary and capricious reliquidation, did not intend that it insulate *ultra vires* acts of Customs which directly harm third parties from effective judicial review.

In sum, in view of the foregoing, this court concludes that Citicorp's motion for rehearing must be, and it hereby is, denied.

SO ORDERED.

(Slip Op. 86–113)

FORMER EMPLOYEES OF BADGER COAL CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 86–07–00934

Before TSOUCALAS, *Judge.*

[2] See, *e.g.*, Affidavit of Mehli M. Mistri, para. 2, p. 2 (June 5, 1986); letter of Kenneth N. Wolf, Esq. dated June 17, 1986.
[3] Memorandum in Support of Motion of Intervenor-Defendant RAJ Chemicals, Inc. for Reassignment to Three-Judge Panel and Motion for Rehearing or to Alter and Amend Judgment, p. 8.

OPINION

[Defendant's motion to dismiss for lack of jurisdiction granted.]

(Decided November 3, 1986)

Woodrow Barker (on behalf of Former Employees of Badger Coal Co.), *pro se.*
Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Platte B. Moring, III),* for the defendant.

TSOUCALAS, *Judge:* Plaintiffs, Woodrow Barker on behalf of the former employees of Badger Coal Co., are proceeding *pro se* in this action for trade adjustment assistance, against defendant, the United States. Plaintiffs sought to commence this action on July 17, 1986 by sending a letter to the Clerk of the Court seeking judicial review of the final determination of the Secretary of Labor in investigation TA–W–17,188, which was published on July 16, 1986. 51 Fed. Reg. 25,761, 25,762 (1986). That letter was deemed a summons and complaint by the Clerk, who informed Mr. Barker of the necessity of submitting a $50 fee upon commencement of an action in this Court. USCIT R. 3(b). Plaintiffs have failed to comply with this requirement. Therefore, defendant has made a motion, pursuant to Rule 12(b)(1), to dismiss for lack of jurisdiction. To date, plaintiffs have not remitted the fee and have failed in any other way to respond to defendant's motion.

DISCUSSION

The filing of fees in this Court is governed by 28 U.S.C. § 2633(a) (1982) which provides that "[a] filing fee shall be payable to the clerk of the Court of International Trade upon the commencement of a civil action in such court." The CIT Rules similarly provide: "[w]hen an action is commenced, a $50 filing fee shall be paid to the clerk of the court * * *." USCIT R. 3(b). Further, 28 U.S.C. § 2636(d) (Supp. III 1985), which specifically governs the type of action plaintiffs sought to commence, provides that "[an action for trade adjustment assistance] is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of [the Secretary's] determination."

It is clear that defendant's motion must be granted since plaintiffs' refusal to comply with the pertinent statutes leaves this Court without jurisdiction to entertain its claim. Moreover, plaintiffs have demonstrated an unequivocal and inexcusable failure to pursue their cause of action. Despite a warning from the Clerk of the Court that failure to remit the filing fee might result in dismissal of this action and despite three attempts by counsel for defendant to contact Mr. Barker regarding the fee, he has failed to act. Indeed, he has chosen not to respond to this motion.

Decisions of the Court of Appeals for the Federal Circuit and the Court of International Trade make it plain that timely compliance with the relevant statutes and rules of court concerning the commencement of an action is a prerequisite to the proper exercise of

jurisdiction. *See Georgetown Steel Corp.* v. *United States,* Appeal No. 85–2805 at 6–7 (Fed. Cir. Sept. 18, 1986); *Nature's Farm Products, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–108 (Oct. 22, 1986); *NEC Corp.* v. *United States,* 9 CIT 557, 622 F. Supp. 1086 (1985), *reh'g denied,* 10 CIT ——, 628 F. Supp. 976 (1986); *see also Keith* v. *Heckler,* 603 F. Supp. 150, 154–57 (E.D. Va. 1985) (where rule of court requires advance payment, failure to timely remit filing fee is a jurisdictional defect). *A fortiori,* total failure to comply with these requirements will result in dismissal for lack of jurisdiction. The jurisdictional considerations alone, of course, mandate dismissal.[1] Apart from those concerns, however, I am unwilling to frustrate the administrative operations of the Court by allowing parties to comply with rules whenever they choose, or, as in this case, not to comply at all.

For the foregoing reasons, plaintiffs' action is dismissed.

(Slip Op. 86–114)

HYUNDAI PIPE CO., LTD., UNION STEEL MFG. CO., LTD., PUSAN PIPE CO., LTD. AND KOREA STEEL PIPE CO. LTD. PLAINTIFFS *v.* U. S. INTERNATIONAL TRADE COMMISSION AND THE UNITED STATES, DEFENDANTS

Court No. 84–6–00763

Before DICARLO, *Judge.*

[Plaintiff's motion for preliminary injunction is denied.]

(Decided November 5, 1986)

Mudge Rose Guthrie Alexander & Ferdon (N. David Palmeter, Donald B. Cameron, Jeffrey S. Neeley and *Kevin B. Duyer)* for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Commercial Litigation Branch *(Platte B. Moring, III); Lyn M. Schlitt,* General Counsel, *Michael P. Mabile,* Assistant General Counsel, United States International Trade Commission *(Edwin J. Madaj)* for defendant.

Schagrin Associates (Roger B. Schagrin and *Paul W. Jameson)* for *amicus curiae* The Committee on Pipe and Tube Imports.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs instituted this action pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (Supp. II 1984), and 28 U.S.C. § 1581(c) (1982), to contest the final affirmative injury determination of the United States International Trade Commission (Commission) in the antidumping investigation of *Certain Welded Carbon Steel Pipes and*

[1] USCIT R. 6(b), allowing for discretionary extensions of time to perform required acts, is not available to plaintiffs since by its express terms it requires a motion based upon good cause. No such motion has been made in the instant case. In any event, given the facts of this case, I need not reach the question as to whether, in light of the Congressional mandate of 28 U.S.C. § 2633(a), the Court, upon motion, may validly exercise its discretion so as to allow late payment of the fee. *See Keith* v. *Heckler,* 603 F. Supp. at 154–57; *Georgetown Steel,* Appeal No. 85–2805 t 10 (CIT rules may not alter statutory requirements); *but cf. Parissi* v. *Trichron, Inc.,* 349 U.S. 46 (1955) (per curiam) (appeal timely where 28 U.S.C. § 1917 filing fee inadvertently paid four days late); *Rodgers* v. *Bowen,* 790 F.2d 1550, 1552 (11th Cir. 1986) (late payment of 28 U.S.C. § 1914 filing fee not a jurisdictional defect).

Tubes From the Republic of Korea and Taiwan, 49 Fed. Reg. 19747 (May 9, 1984), which resulted in the issuance by the United States Department of Commerce, International Trade Administration (Commerce) of two antidumping duty orders on categories of products covered by the Commission's determination.

Plaintiffs now move for a preliminary injunction to delay an administrative review of the antidumping duty orders under section 751 of the Trade Agreements Act of 1979, as amended by the Tariff and Trade Act of 1984, 19 U.S.C. § 1675, for the eleven month period prior to October 1, 1984. Plaintiffs' motion is denied.

I. Background

Commerce published final antidumping duty orders on two categories of pipes and tubes from the Republic of Korea, finding margins of 1.47 percent and .90 percent. During the period of the investigations, the average margins at which these classes of merchandise undersold domestic products were 30 percent and 19 percent respectively.

On June 27, 1984 plaintiffs filed an action contesting the Commission's determination that an industry in the United States is materially injured by imports of the Korean pipe and tube products. Plaintiffs argue that the affirmative injury determination of the Commission is unlawful since it failed to take into consideration the size of the dumping margins in connection with its causation analysis under 19 U.S.C. § 1677(7)(B). The case is pending before the Court and all issues have been fully briefed. Oral argument was held on July 17, 1986.

In accordance with a voluntary restraint agreement entered into by the United States and the government of Korea, the antidumping duty orders were revoked by Commerce for all pipes and tubes exported to the United States on or after October 1, 1984. As a result, only pipes and tubes entered between the publication of October 1983 preliminary dumping determinations and the date of effective revocation remain subject to the antidumping duty orders.

In June 1986, petitioner, The Committee on Pipe and Tubes Imports, made a request under 19 U.S.C. § 1675(a) and 19 C.F.R. § 353.53a(a)(5) that Commerce commence an administrative review under section 751. Commerce published notice of its initiation of the administrative review and on October 7, 1986 issued questionnaires, requesting that plaintiffs submit within 45 days information relating to the administrative review.

Plaintiffs moved for a temporary restraining order and a preliminary injunction on October 28, 1986 to delay the administrative review. The Court denied plaintiffs' motion for injunctive relief pending a hearing on plaintiffs' motion for a preliminary injunction. The hearing was held on November 3, 1986.

Plaintiffs seek to delay the administrative review under section 751 pending the resolution of their challenge to the legality of the

Commission's final affirmative injury determination. Plaintiffs say they will suffer irreparable harm if required to participate in reviews, since they "will have to devote enormous amounts of time, resources, and expense to provide the voluminous data required by the Commerce Department in accordance with their questionnaires." Brief for Plaintiffs at 7.

The government opposes plaintiffs' motion for a preliminary injunction contending (1) the Court lacks jurisdiction to grant the requested relief, (2) that plaintiffs' motion fails to state a claim for relief since the statute requires that Commerce commence an administrative review when a proper request is made, and (3) even if injunctive relief could be granted, plaintiffs have not shown that they will be irreparably harmed.

II. The Preliminary Injunction

1. *Jurisdiction*

Plaintiffs' action is brought under 28 U.S.C. § 1581(c). That provision grants jurisdiction only over those actions specified in 19 U.S.C. § 1516a. The action brought by plaintiffs, specified in 19 U.S.C. § 1516a(a)(2)(B)(i), calls for a review by the Court, on an administrative record, of a final affirmative determination by the Commission under 19 U.S.C. § 1673d(b)(1)(A)(i) that an industry in the United States is materially injured by reason of imports of certain merchandise.

Plaintiffs say that their motion for injunctive relief is not a challenge to Commerce's initiation of a section 751 review or any decision other than the Commission's injury determination. Rather they seek to delay Commerce's review pending the Court's decision as to the legality of the Commission's determination. They contend that the Court has inherent power to issue orders enjoining other federal agencies in order to preserve the status quo in actions brought within its jurisdiction.

The government asserts that plaintiffs' motion for injunctive relief is based on an independent and unrelated claim which is not properly before the Court. It says that questions regarding the commencement of a section 751 review are beyond the scope of the pleadings and do not relate to the validity of the Commission's final affirmative injury determination under *British Steel Corp.* v. *United States*, 10 CIT ——, Slip Op. 86–104 (Oct. 17, 1986), *appeal docketed*, No. 87–1050 (Fed. Cir. Nov. 3, 1986).

The government also argues that plaintiffs' motion must be denied since section 1516a allows parties to commence an action challenging a section 751 proceeding only upon completion of the administrative review. Since the initiation of a section 751 review may not be challenged under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the government says that plaintiffs have challenged an interlocutory order not now subject to judicial review, citing *Timken*

Co. v. *United States,* No. 82–6–00890 (CIT Oct. 10, 1986) (Commerce decision to initiate an antidumping investigation is an interlocutory order not currently subject to judicial review).

The government further contends that Commerce's congressional mandate to conduct administrative reviews precludes plaintiff from attempting to impede properly commenced administrative reviews, and therefore, plaintiffs motion presents "a claim for which this Court cannot grant relief." Brief for Defendant at 13.

This is a case in which there has been a full discussion on the merits of the motion. Since the Court finds that a denial of the motion would be required on the merits, the Court declines to resolve with haste the questions raised concerning the scope of its jurisdiction and equitable powers. *See Secretary of the Navy* v. *Avrech,* 418 U.S. 676, 677–78. In light of the complexity of the jurisdictional issues and the exigency with which the motion must be resolved, the Court turns to the merits of plaintiffs' motion for a preliminary injunction.

2. *Criteria for Granting Injunctive Relief*

The Court finds that plaintiffs do not satisfy the criteria necessary for the issuance of a preliminary injunction. In order to prevail on their motion, plaintiffs must show (1) a threat of immediate and irreparable harm; (2) likelihood of success on the merits; (3) that the public interest would be better served by issuing rather than by denying the injunction; and (4) the balance of hardships on the parties favors issuing the injunction. *See, e.g., Zenith Radio Corp.* v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983).

Plaintiffs must make a clear showing that they are entitled to this relief. *Asher* v. *Laird,* 414 F.2d 360, 362 (D.C. Cir. 1973); *Dijub Leasing Corp.* v. *United States,* 1 CIT 42, 51, 505 F. Supp. 1113, 1120 (1980). Plaintiffs have not met their burden of persuasion, or heavy burden of producing evidence, sufficient to justify the extraordinary remedy of a preliminary injunction.

The harm suffered by plaintiffs in the absence of an injunction must be both immediate and irreparable. Plaintiffs argue that they will suffer such harm if required to complete the questionnaires issued by Commerce pursuant to the requested 751 review.

Affidavits submitted by plaintiffs indicate that approximately 1,200 working hours will be spent by Pusan Steel Pipe and 1,120 by Korea Steel Pipe in answering the questionnaires. Plaintiffs also assert that the verification of answers as required by Commerce will compound their costs.

The Court accepts that the time limits imposed by Commerce for completing the questionnaires will cause an immediate financial burden upon plaintiffs. But Commerce issues questionnaires in every case where a party requests administrative review under section 751. The Court is not persuaded that such costs constitute the irreparable harm necessary to warrant injunctive relief. In *FTC* v.

Standard Oil, 449 U.S. 232, 244 (1980), the Supreme Court rejected the proposition that mere litigation costs, even if substantial and unrecoupable, constituted irreparable injury. *See also UST, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–100 (Oct. 10, 1986) (citing *Renegotiation Board* v. *Bannercraft Clothing Co. Inc.,* 415 U.S. 1, 24 (1973)).

Plaintiffs attempt to distinguish such cases by arguing that not all of the expenses suffered will be incidental to litigation. According to plaintiffs, their costs in completing the questionnaires constitute business expenses resulting from the diversion of management and sales personnel from their normal income producing activities.

The parties stipulated at the hearing that time will be diverted from business activities in order to satisfy the requirements of the questionnaires. But increased business expenses alone also do not justify the injunction sought. *S.J. Stile Associates Ltd.* v. *Snyder,* 68 CCPA 27, 30–31, C.A.D. 1261, 646 F.2d 522, 525–26 (1981); *American Institute for Imported Steel, Inc.* v. *United States,* 8 CIT 314, 318, 600 F. Supp. 204, 208 (1984).

In any event, the Court finds that the costs borne by the companies in utilizing their own employees is linked directly to the agency action in issuing the questionnaires and consequently is a normal litigation expense. Under the circumstances of this case, the Court is not persuaded that plaintiffs would suffer any irreparable injury justifying issuance of a preliminary injunction.

Plaintiffs say that the strong likelihood that they will prevail in the underlying case challenging the Commission's determination offsets any shortcoming in their showing of irreparable injury. Since the Court is fully briefed, plaintiffs contend, the Court is well aware of the strong likelihood of their success on the merits.

Plaintiffs' action challenging the antidumping duty order, however, presents complex issues making it difficult to assess plaintiffs' likelihood of success. At this time, the Court believes plaintiffs have a moderate likelihood of success on the merits. Even if the case were remanded to the Commission with instructions to consider the size of the dumping margins in connection with its causation analysis, it remains a matter of speculation whether the Commission would ultimately issue a final negative injury determination.

Plaintiffs argue that the issuance of a preliminary injunction would better serve the public interest by delaying an administrative review which may be unnecessary thus conserving limited government resources. They say that delay is particularly appropriate because delaying the annual reviews will have no effect on current or future entries since the antidumping duty orders have been revoked.

While plaintiffs' request has a certain appeal, Commerce should follow the law. Congress has required that Commerce conduct an administrative review of an antidumping duty order upon a timely request by an interested party. 19 U.S.C. § 1675(a). This review

process was created to expedite the administration of the assessment phase of antidumping and countervailing duty investigations, to provide a greater role for domestic interested parties and to introduce more procedural safeguards. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 80–81 (1979). The public interest is served when agencies act in conformity with a statutory mandate designed to achieve goals inuring to the public benefit.

If discretion exists as to when and in what manner reviews will be conducted once initiated, that discretion normally rests in the agency. It is not the role of plaintiffs or the courts to second guess reasonable agency decisions regarding use of its limited resources. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

Finding that the expense suffered by plaintiffs in completing Commerce questionnaires is not irreparable injury and that plaintiffs only have a moderate likelihood of success on the merits, the Court has little to weigh on plaintiffs' side against the public interest served in not issuing a preliminary injunction. The Court concludes in balancing the hardships that plaintiffs' motion for a preliminary injunction should be denied.

(Slip Op. 86–115)

CHEMICAL PRODUCTS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–11–01541

Before DICARLO, *Judge.*

Plaintiff challenges the final determination of sales at less than fair value by the United States Department of Commerce, International Trade Administration (Commerce) in its investigation of barium chloride from the People's Republic of China (PRC). Plaintiff contends that the constructed foreign market value of barium chloride based on costs in Thailand was improperly underestimated since Commerce: (1) failed to include the cost of calcium chloride, a factor of production used at one of the two barium chloride plants; (2) calculated the value of natural gas used as an energy source at one plant based on the cost of coal in Thailand; (3) used data from Brazil rather than from Thailand in determining inland freight rates; (4) allocated factors of production between barium chloride and hydrogen sulfide gas on a quantity basis rather than on a value basis; and (5) employed the minimum eight percent factor in calculating profit under 19 U.S.C. § 1677b(e)(1)(b)(ii) (1982 & Supp. II 1984) and 19 C.F.R. § 353.6(a)(2) (1984).

Held: Commerce is required under 19 U.S.C. § 1677b(c) (1982) and 19 C.F.R. § 353.8(c) to calculate foreign market value in a surrogate country based on factors of production used in a state-controlled economy to produce the merchandise under investigation. Commerce may not exclude factors of production from its calculation when it finds that such factors are obtained by a plant in the state-controlled economy at no cost. Commerce must allocate factors of production between products which share a production process taking into consideration the value of the respective products. Commerce's determination is sustained in all other respects.

[The action is remanded.]

(Decided November 6, 1986)

Gibson, Dunn & Crutcher (Joseph H. Price and *Robert M. Kruger)* for plaintiff.
Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(A. David Lafer)* for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Chemical Products Corporation (CPC), a domestic producer of barium chloride, challenges a final determination by the United States Department of Commerce, International Trade Administration (Commerce) of sales at less than fair value of barium chloride from the People's Republic of China (PRC). *Barium Chloride from the People's Republic of China* (Final), 49 Fed. Reg. 33916 (1984). The Court holds that Commerce's valuation of a liquid brine solution with a high calcium chloride content, based solely on its transportation cost, and Commerce's allocation of factors of production to hydrogen sulphide gas, are not supported by substantial evidence in the record or in accordance with law.

I. BACKGROUND

Commerce determined that barium chloride from the PRC is being sold in the United States at a less than fair value margin of 14.5 percent. 49 Fed. Reg. 33916 (1984). Plaintiff seeks review of Commerce's determination pursuant to section 516A(a)(2)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A) (1982 & Supp. II 1984). The Court has jurisdiction under 28 U.S.C. § 1581(c) (1982).

The question presented is whether the following determinations by Commerce are supported by substantial evidence and in accordance with law:

1) The decision to calculate the value of a liquid brine solution, which is used in the production of barium chloride, solely on the basis of its transportation cost for the reason that is was obtained free of charge in the PRC;

2) The valuation of the energy input at one barium chloride plant based on the price in Thailand of coal rather than the price of natural gas, the energy source used by the plant in the PRC;

3) The valuation of inland river freight charges based on Brazilian freight rates rather than those prevailing in Thailand;

4) The allocation of factors of production between barium chloride and hydrogen sulfide gas on a quantity basis rather than on the value of the respective products; and

5) The use of the minimum eight percent profit factor in calculating foreign market value under 19 U.S.C. § 1677b(e)(1)(b)(ii) and 19 C.F.R. § 353.6(a)(2).

II. Discussion

1. *The Calcium Chloride Input*

The PRC has a state-controlled economy, and Commerce used constructed value under 19 U.S.C. § 1677b(c)(2) (1982) to determine the foreign market value of barium chloride based on the value of factors of production in Thailand. 49 Fed. Reg. at 33917. 19 U.S.C. § 1677b(e)(1)(A) states in part that "the constructed value of imported merchandise shall be the sum of * * * the cost of materials * * * and of fabrication or other processing of any kind employed in producing such or similar merchandise * * *." The regulation adopted by Commerce to implement the statute states in part:

> *the constructed value of such or similar merchandise may be determined from the costs of specific objective components or factors of production* incurred in producing the merchandise in question, *including,* but not limited to, hours of labor required, *quantities of raw materials employed,* and amounts of energy consumed, if such information is obtained from the producer of the merchandise in the state-controlled-economy country under investigation, and verification of such information in the state-controlled-economy country, is concluded to the satisfaction of the Secretary. *Such components or factors shall be valued and such values verified in a non-state-controlled-economy country* determined to be reasonably comparable in economic development to the state-controlled-economy country under investigation.

19 C.F.R. § 353.8(c) (1984) (emphasis added).

Calcium chloride is a factor of production used in producing barium chloride at one of the plants investigated by Commerce. R. Doc. 88, at 3. The plant's source of calcium chloride is salt brine liquid which it receives from three salt factories at no charge. R. Doc. 116, at 5. In its preliminary determination, Commerce calculated the value of the calcium chloride input at 450 baht per metric ton, based on the average price of a calcium chloride solution in Thailand. 49 Fed. Reg. 13728 (1984).

In its final determination, Commerce determined that constructed foreign value should not include an amount representing the value of calcium chloride, based on the circumstance that the plant's source of calcium chloride is brine which it receives free of charge. Commerce stated:

> We have valued this factor by determining the weighted-average distance between the Zhangjiaba plant and its brine sources and then determining freight costs in Thailand for transporting brine such a distance.

49 Fed. Reg. at 33919.

Plaintiff argues that Commerce violated the statute and regulation requiring that factors of production be calculated based on

their value in a surrogate country. Plaintiff says that by considering circumstances prevailing in the state-controlled economy, *i.e.* the fact that PRC brine is supplied "free of charge", Commerce unlawfully accepted the PRC value or cost of calcium chloride rather than that of the surrogate in determining the value to attribute to that factor of production.

In determining that the PRC is a state-controlled economy for the purpose of this investigation, Commerce considered that the setting of prices and the establishment of output quotas reveal state intervention in the economy of the PRC. 49 Fed Reg. a+ 33917; *see Chloropicrin from the People's Republic of China,* 49 Fed. Reg. 5982, 5985 (1984). Under such circumstances 19 U.S.C. § 1677b(c)(e) and 19 C.F.R. § 353.8 preclude Commerce from determining in the home market economy the costs and expenses incurred by the PRC barium chloride industry. *See ICC Industries, Inc.* v. *United States,* 10 CIT ——, 632 F. Supp. 36, 39 (1986).

Commerce's failure to calculate the value of calcium chloride based on its value in Thailand does not comport with the constructed value provisions of the statute or the regulation, neither of which allows Commerce to avoid calculating the value of a factor of production in a surrogate country based on circumstances peculiar to the state-controlled economy. Deviation from the statutory and regulatory framework when a factor of production is deemed to be available free of charge in the state-controlled economy impermissably invites the dangers that the state-controlled economy provisions were designed to avoid. *See Carbon Steel Wire Rod From Poland: Final Determination of Sales at Less Than Fair Value,* 49 Fed. Reg. 29434 (use of state-controlled-economy prices to determine foreign market value improper under the statute as a result of state interference in the marketplace).

Defendant's argument that calcium chloride is not identical to salt brine liquid with a high calcium chloride content does not justify Commerce's failure to calculate the Thai value of a raw material input used by a PRC plant in the manufacture of barium chloride. Nor is Commerce's failure to determine the Thai value of the input justified by its characterization of brine liquid solution as a "waste product". This Court recently upheld Commerce's finding that hydrogen sulfide gas is not a waste product since it can be, and is, used in certain plants as a raw material input in the production of sulfur and sodium thiosulfate. *Chemical Products Corp.* v. *United States,* 10 CIT ——, Slip Op. 86–97, at 19 (1986). It follows that the brine liquid solution, which is beneficially applied in the production of barium chloride, is likewise not a waste product, and must be valued as an input not only on the basis of its transportation cost.

Defendant also argues that the allocation of a zero value to the brine liquid was correct since "it would be just as valueless in any country (be it a non-state-controlled economy country or a state-controlled economy country), since any salt producer would be more

than willing to give it away rather than incur expenses in disposing of the waste." Brief for defendant at 7. This argument suggests that the value of brine liquid with a high calcium chloride content would be zero if Commerce had ascertained its value in Thailand. The Court cannot accept this conclusion, however, since the record contains no evidence that salt brine containing calcium chloride is a commodity having a zero value in Thailand. *See* Transcript of Oral Argument at 32. The Court holds that Commerce's valuation of calcium chloride based solely upon its transportation cost valued in Thailand is not supported by substantial evidence or in accordance with law.

2. *The Energy Input*

One of the two barium chloride plants in the PRC investigated by Commerce uses coal as an energy source, while the other uses natural gas. Commerce valued the energy component of both plants based on the value of coal in Thailand. The final determination states:

> Natural gas in Thailand is in short supply and is therefore sold to only two end users by the Petroleum Authority of Thailand. As a practical matter, natural gas is not available to industrial users in Thailand. We have therefore valued the PRC factor for natural gas by valuing in Thailand an amount of coal with the same calorific value (kilocalories) as the PRC factor for natural gas.

49 Fed. Reg. at 33918.

Plaintiff says that Commerce violated its regulation by not using the price for Thai natural gas since 19 C.F.R. § 353.8(c) requires that constructed value be computed "from the costs of specific objective components or factors of production incurred in producing the merchandise in question" valued and verified in the surrogate country. According to plaintiff:

> [W]here, as in this case, a specific price is available in the surrogate country for the actual factor or input used in the nonmarket-economy country, *i.e.*, natural gas, Commerce may not, consistent with its own regulations, disregard that price.

Brief for plaintiff at 14.

The record shows that natural gas prices and supplies are controlled by the government in Thailand. R. Doc. 35. The record also shows that natural gas in Thailand is not freely available but is sold only to two commercial users. The United States Embassy in Bangkok reported that:

> The Petroleum Authority of Thailand currently sells natural gas to two end-users (the Electricity Generating Authority of Thailand and Siam Cement) at dols 4.10 per million BTU. As a practical matter, however, because of shortfalls in production of

> natural gas from Thailand's off-shore drilling reserves, supplies of natural gas are not available to industrial users * * *.

R. Doc. 44. Since natural gas is, with few exceptions, not available to industrial users in Thailand, it was not unreasonable for Commerce to seek an alternative to Thai natural gas prices as a means of valuing the energy factor of production of the plant in the PRC using natural gas as its energy source.

Commerce has broad discretion in administering the antidumping law. *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983). The Court must also accord great deference to Commerce's interpretation of its own regulations. *See American Lamb Co.* v. *United States*, 785 F.2d 994 (Fed. Cir. 1986); *Chemical Products Corp.* v. *United States*, 10 CIT ——, Slip Op. 86–97, at 4 (1986). Commerce was required by its regulation to ascertain and value in a surrogate country the "amounts of energy consumed" in the production of barium chloride in the PRC. 19 C.F.R. § 353.8(c) (1984). Under the circumstances of this case, the Court holds that Commerce's determination of the value of the energy consumed by the plant in the PRC using natural gas, based on the price in Thailand of an amount of coal with the same calorific value, is supported by substantial evidence and in accordance with law.

3. *Inland Freight Charges*

In constructing the foreign market value of barium chloride from the PRC, one of the factors Commerce was required to value was the cost incurred for inland freight transportation. The total inland distance in the PRC for which Commerce needed to value freight costs was 3,235 kilometers. The longest river freight haul in Thailand, however, is 130 kilometers. The Commerce case analyst stated:

> Since the per kilometer charge decreases as the distance increases, it would not be realistic to calculate a charge for the 3,235 kilometer journey in the PRC based on a 130 kilometer journey in Thailand. We therefore sought information concerning freight charges on other major river systems in non-state-controlled economy countries.

R. Doc. 133. Commerce consequently used Brazilian rates to value the charge for inland freight transportation based on prevailing rates for large shipments of chemicals on the Amazon River.

Plaintiff says that 19 C.F.R. § 353.8(c) contemplates the use by Commerce of a single surrogate country in which factors of production and all other costs must be valued. It points out that in response to its argument that the cost of a hydrochloric acid input be valued based on the price prevailing in India, Commerce stated:

> We also find it administratively infeasible to move back and forth around the world valuing factors of production. We have determined, pursuant to section 353.8(c) of the regulations, that

> Thailand and the PRC are at comparable stages of economic development. We therefore have valued all of the factors of production in Thailand without reference to relative values in other countries such as India.

49 Fed. Reg. at 33919.

The Court finds that Commerce's response to plaintiff's comment does not constitute an interpretation of section 353.8(c) by that agency requiring that all factors of production as well as all other related charges be valued based on data from a single surrogate country. Nor does plaintiff argue that such a policy would be desirable where a comparison of specific factors would lead to a skewed or absurd result. Rather plaintiff contends that Commerce was required by the regulation to attempt to use Thai rates, suitably adjusted, if necessary, recognizing that those rates are for a short distance. *See* Transcript of Oral Argument at 8–10.

The regulation is silent concerning whether Commerce may use data from a country other than its designated surrogate when Commerce finds that a comparison of one element of foreign market value in the surrogate would yield an unrealistic result. But since the Court must give "tremendous deference" to the agency administering the antidumping law. *Smith-Corona Group* v. *United States*, *supra*, at 1582, the Court cannot conclude that Commerce's use of Brazilian freight rates is violative of the statute or based on an impermissible interpretation of its regulation.

Since Commerce's explanation of why Brazilian and not Thai freight rates were used is reasonable and supported by evidence in the record, the Court holds that Commerce's determination is supported by substantial evidence and in accordance with law.

4. *Allocation of Factors of Production*

Commerce determined that the barium chloride production process yields an amount of hydrogen sulfide gas (HSG). Commerce therefore allocated a portion of the factors of production to HSG, which lowered the foreign market value that would have resulted if all factors of production had been allocated to barium chloride. Commerce based its allocation on the quantity of each chemical yielded by the production process without regard to the respective values of the products.

Commerce's determination that HSG has value is supported by substantial evidence since the record shows that it is used to produce sodium hydrosulfide. R. Doc. 31. The Court recently held, however, that Commerce may not allocate factors of production between two products on a quantity basis if the products have significantly different values. *Chemical Products Corp.* v. *United States*, 10 CIT ——, Slip Op. 86–97, at 18–21 (1986). Commerce must, therefore, find a reasonable means of determining the market value of HSG or the value of HSG to the producing plant so that the record shows the respective values of barium chloride and HSG. If the val-

ues are not equal, Commerce must adjust its allocation of factors of production to reflect the difference in the value of the products.

5. *Profitability*

Commerce is required to include in its calculation of constructed foreign market value an amount for profit not less than eight percent of the sum of general expenses and cost under 19 U.S.C. § 1677b(e)(1)(B) (1982 & Supp. II 1984) and 19 C.F.R. § 353.6(a) (1984). To determine an appropriate profitability figure to include in its calculations, Commerce surveyed four Thai companies which showed average profits during 1983 of 7.85%. Commerce therefore used the minimum eight percent profit figure. The profitability figures used in Commerce's survey were the same as those used by Commerce to determine profitability in an investigation of the PRC's barium carbonate industry. The Court upheld Commerce's use of those figures in *Chemical Products Corp.* v. *United States*, 10 CIT ——, Slip Op. 86–97 (1986). For the reasons set forth in that opinion, the Court holds that Commerce's use of the minimum eight percent profit factor in this case is supported by substantial evidence and in accordance with law.

III. Conclusion

The action is remanded for Commerce to redetermine the value of the calcium chloride factor of production and to make any necessary adjustments to the allocation of factors of production between barium chloride and HSG in accordance with this opinion. Commerce shall file with the Court within 45 days a supplemental record explaining its redetermination. Plaintiff shall file any comments on the results of the remand within 15 days after the filing of Commerce's redetermination, and defendant shall respond within 10 days after the filing of plaintiff's comments.

So ordered.

(Slip Op. 86–116)

McKechnie Brothers (N.Z.) Ltd., plaintiff *v.* Department of Commerce, defendant, and Cerro Metal Products, intervenor-defendant

Court No. 85–12–01859

Memorandum and Order

[Plaintiff's motion to compel discovery denied.]

(Dated November 7, 1986)

Bronz & Farrell (Edward J. Farrell) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*J. Kevin Hor-*

gan) for the defendant; *M. Linda Concannon*, Attorney-Advisor, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

Collier, Shannon, Rill & Scott (*David A. Hartquist* and *Jeffrey S. Beckington*) for the intervenor-defendant.

AQUILINO, *Judge:* In this action seeking judicial review of a final affirmative determination by the International Trade Administration, U.S. Department of Commerce of sales of low-fuming brazing copper rod and wire from New Zealand at less than fair value, the plaintiff has served defendant's counsel with interrogatories and requests for production of documents and for admissions.

The defendant objected to the requests on the ground that review of this action is "confined to * * * the record made by the administering authority and filed with the Court", citing 19 U.S.C. § 1516a(b) and 28 U.S.C. § 2640(b) for support. The plaintiff has now moved for an order compelling the discovery pursuant to CIT Rule 37(a).

The referenced statutes do indeed indicate that review of an action such as this is based on the administrative record, which is defined generally as

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register. 19 U.S.C. § 1516a(b)(2)(A)

The defendant filed its record with the Clerk of the Court in March 1986. There is no indication that the plaintiff has sought to review the record since that time. In fact, the motion to compel makes no showing that that record is incomplete or inadequate in any way. Rather, plaintiff's position is stated as follows:

> * * * While we do not contest that the court's review here is limited to a review on the record it seems inconceivable that plaintiff [*sic*] would be denied the right to inquire into the compilation and use of that record in the decision making process. Indeed, how else is plaintiff able to generate admissable evidence for the court to weigh in it [*sic*] decision of whether the administrative findings are "unsupported by substantial evidence, or otherwise not in accordance with law".[1]

This rhetoric assumes that matter which generally is discoverable pursuant to the CIT Rules of procedure and admissable under the Federal Rules of Evidence has a place in an action such as this. However, only in "exceptional" or "rare" circumstances is such evidence permitted. *Cf. Beker Industries Corp.* v. *United States*, 7 CIT

[1] Motion to Compel Defendant to Respond to Interrogatories and Requests for Admissions and the Production of Documents, p. 2.

361 (1984); *National Corn Growers Association* v. *Baker*, 10 CIT ——, 636 F.Supp. 921, 929–30 (1986). *See generally Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

No such circumstance is shown by the plaintiff here, and its motion to compel discovery must therefore be denied.

SO ORDERED.

(Slip Op. 86–117)

STAR SALES & DISTRIBUTING CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–5–00728

Before DICARLO, *Judge*

[Defendant's motion for summary judgment is granted; plaintiff's cross-motion for summary judgment is denied; the action is dismissed.]

(Decided November 7, 1986)

Casner, Edwards & Roseman (Walter H. Mayo III) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Sheila N. Ziff)* for defendant.

DICARLO, *Judge:* Plaintiff, an importer of metal fasteners from Japan, brings this action under 28 U.S.C. § 1581(a) challenging the United States Customs Service (Customs) denial fo two protests as untimely. Defendant moves for summary judgment and plaintiff opposes, alleging the existence of a genuine issue of material fact as to the posting of the notices of liquidation by Customs. Plaintiff amends its complaint to assert jurisdiction under 28 U.S.C. §§ 1581(i) and 1585 and cross-moves for summary judgment; defendant opposes on the ground that the Court lacks jurisdiction. The Court grants defendant's motion for summary judgment and denies plaintiff's cross motion, dismissing the action for lack of jurisdiction.

BACKGROUND

In June 1979, the Treasury Department published in the Federal Register a final countervailing duty (CVD) determination and order covering certain industrial fasteners from Japan. T.D. 79–158 (1979). The "Action" heading for this CVD order reads "Final Countervailing Duty Order and Suspension of Liquidation." The phrase "and Suspension of Liquidation" was improperly included and was deleted later that month.

From June 1979 through June 1981, plaintiff entered 46 shipments of fasteners covered by T.D. 79–158. These 46 entries were liquidated from July 1979 through August 1981 at the rate of 4% ad valorem as set by the CVD order.

Prior to the liquidation of some of these entries, the administration of the CVD program was transferred to the Department of Commerce (Commerce) by Executive Order No. 12188 effective January 2, 1980. In May 1980, Commerce published a notice of its intention to review, on an annual basis, all CVD orders then in existence. This notice did not include entries of Japanese fasteners covered by T.D. 79–158 on the list of existing orders to be reviewed. Customs thus continued liquidating entries of Japanese fasteners at the duty rate set forth in that CVD order.

In November 1980, pursuant to instructions from Commerce, Customs advised its field personnel by telex that liquidations of entries subject to T.D. 79–158 were to be suspended immediately. Despite this telex ordering suspension, liquidations of plaintiff's entries continued until the last liquidation in August 1981.

Customs received a protest from plaintiff on April 19, 1982, contesting liquidation of the first 14 entries of Japanese fasteners imported by plaintiff. The protest was denied as untimely on November 15, 1982. Customs received a second protest on April 20, 1982, contesting liquidation of the remaining 32 entries of fasteners imported by plaintiff. On November 16, 1982, this protest also was denied as untimely filed.

In May 1983, plaintiff commenced this action pursuant to 28 U.S.C. § 1581(a) challenging the denial of these two protests filed in connection with its 46 entries. The Court allowed plaintiff to amend its complaint to assert jurisdiction under 28 U.S.C. §§ 1581(i) and 1585 in March 1986.

Discussion

§ 1581(a)

Plaintiff asserts that this Court has jurisdiction over a challenge to Customs denial of its protests pursuant to 28 U.S.C. § 1581(a). The Court finds, however, that more than 90 days had elapsed between the liquidation contested by plaintiff, the last of which took place on August 28, 1981, and the filing of plaintiff's protests on April 19 and 20, 1982. Where a protest is filed more than 90 days after notice of liquidation, the Court does not have jurisdiction over an action contesting the denial of such protest. 19 U.S.C. § 1514(c)(2) (1982); *see Computime, Inc.* v. *United States*, 8 CIT 259, 261, 601 F. Supp. 1029, 1030 (1984), *aff'd*, 772 F.2d 874 (Fed. Cir. 1985); *Wally Packaging, Inc.* v. *United States*, 7 CIT 19, 22, 578 F. Supp. 1408, 1411–12 (1984).

Plaintiff contends that a trial is necessary to resolve the question of whether notices of liquidation regarding the 46 entries were actually posted by Customs pursuant to 19 C.F.R. § 159.9(b). Plaintiff asserts that defendant is not entitled to summary judgment on the question of jurisdiction under section 1581(a) since defendant has failed to present any evidence based on personal knowledge that the notices of liquidation were posted.

Defendant is not required to produce evidence based on personal knowledge that liquidation notices were posted in order to avoid a trial on such issue. It is accepted that government officials are entitled to the benefit of a presumption that their duties are performed in the manner required by law. *See, e.g., United States* v. *Getz Brothers & Co.*, 55 CCPA 90, C.A.D. 938 (1968); *Olavarria & Co.* v. *United States*, 47 CCPA 65, C.A.D. 729 (1960). Defendant has bolstered this presumption through the testimony of a Customs official responsible for the posting of notices of liquidation during the time the plaintiff's 46 entries were being liquidated. This official testified to a procedure followed consistent with the requirements of 19 C.F.R. § 159.9(b). These requirements were approved in *Frederick Wholesale Corp.* v. *United States*, 754 F.2d 349 (Fed. Cir. 1985).

In the absence of an affidavit or other evidence from plaintiff, the presumption that notice was posted is sufficient to negate the existence of a genuine issue of material fact. When a party moving for summary judgment has met its burden of demonstrating that no genuine issue of material fact remains, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). Since the protests were not timely filed, the Court does not have jurisdiction over this action under 28 U.S.C. § 1581(a).

§§ 1581(i) and 1585

Plaintiff contends that Customs improperly liquidated the 46 entries contrary to its own policy and instructions and thus jurisdiction exists pursuant to 28 U.S.C. § 1581(i)(4) which provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for
>
> * * * * * * *
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

Plaintiff asserts in its complaint that "it was the practice of the Customs Service in Boston and elsewhere either not to liquidate entries subject to countervailing duties until the level of countervailing duties had been finally established or to reopen such entries, set the final level of duties and reliquidate the entries." Even if true, this argument is not available to plaintiff upon the facts as presented by the parties. The parties agree and the Court finds that T.D. 79-158 was a final CVD determination and order. The level of duties assessed upon certain entries governed by that order was fi-

nally established to be the 4% ad valorem assessed all 46 of plaintiff's entries liquidated by Customs.

Plaintiff argues, however, that Customs did not properly suspend liquidation of certain of its entries pending a review of the CVD order by Commerce after Commerce took over administration of the CVD program. Plaintiff contends that Customs "illegally" ignored internal instructions issued in November 1980 to suspend liquidation of entries of Japanese fasteners covered by the CVD order.

Section 1581(i) is the residual jurisdiction of the Court and may be invoked when other available avenues of jurisdiction are manifestly inadequate or it is necessary to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies. *See Detroit Zoological Society* v. *United States,* 10 CIT ——, 630 F. Supp. 1350, 1353 & n.6 (1986) (and cases cited therein). In *United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 687 F.2d 467, (1982), the court held that section 1581(i) jurisdiction did not exist because plaintiff's proper avenue of redress was under 28 U.S.C. § 1581(a).

Plaintiff argues that its case is not one which can still be brought under section 1581(a) should the Court rule in favor of defendant on that jurisdictional claim. With such avenue no longer available for jurisdiction, plaintiff asserts, the Court should find residual jurisdiction for its action under section 1581(i).

In making a determination of whether a particular remedy is manifestly inadequate, however, the Court must consider whether if properly utilized at the time such remedy or procedure adequately would serve a remedial function. That plaintiff failed to utilize the adequate and effective procedure originally available to it under section 1581(a) does not render such remedial procedure manifestly inadequate. Also, where a traditional means of review exists under section 1581(a) a party may not circumvent the relevant prerequisites to such review (including time limitations) by invoking section 1581(i) jurisdiction. *See American Air Parcel Forwarding Co.* v. *United States,* 5 CIT 8, 10, 557 F. Supp. 605, 607, *aff'd,* 718 F. 2d 1546 (Fed. Cir. 1983).

Finally, 28 U.S.C. § 1585 does not grant the Court jurisdiction since it relates only to the powers of the Court to render an effective judgment once jurisdiction is established. *See, e.g., Manufacture De Machines Du Haut-Rhin* v. *von Raab,* 6 CIT 60, 66, 569 F. Supp. 877, 883 (1983), *appeal dismissed,* No. 83–1341 (1984). Section 1585 cannot be used by plaintiff to create jurisdiction for the Court based on the Court's equity powers.

While many cases such as the present one present facts which invoke the sympathy of the Court, judicial review often is limited by statutory restraints imposed by Congress. In the present situation, the Court must dismiss any action by plaintiff premised upon sections 1581(i) or 1585 for lack of jurisdiction.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/185	Carman, J. October 21, 1986	Hartog of California	86–2–00192	Item 379.02 28%	Item 379.40 21%	Agreed statement of facts	Los Angeles Men's shirts
C86/186	Carman, J. October 21, 1986	Kransco Manufacturing Corp.	84–4–00498	Item 389.62 16¢ per lb. plus 13%	Item A386.13 Free of duty	Agreed statement of facts	Los Angeles Miscellaneous textile products
C86/187	Carman, J. October 22, 1986	Coleco Industries, Inc.	83–9–01259, etc.	Item 737.95 14.9%	Item 688.45 5.1% for Magic Touch Pens Item 256.90 7.7% for Magic Touch cards	Childcraft Education Corp. v. U.S.,	New York Magic Touch Pens and Magic Touch Cards
C86/188	Restani, J. October 22, 1986	Tomy Corp.	85–10–01347	Item 737.95 10.9%	Item 734.20 4.5%	Agreed statement of facts	Los Angeles Games
C86/189	Re, C.J. October 27, 1986	EAC Engineering	83–7–00994	Item 712.05 Various rates	Item 688.40 or 688.45 4.9%	EAC Engineering v. U.S., S.O. 85–11 & 85–32	Charleston Spark detectors
C86/190	Re, C.J. October 27, 1986	Moldow Dust Control, Inc.	82–5–00617	Item 712.05 Various rates	Item 688.40 or 688.45 5.1%	EAC Engineering v. U.S., S.O. 85–11 & 86–32	Charleston Spark detectors

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/266	DiCarlo, J. October 28, 1986	Mitsubishi International Corp.	82-11-01480, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Philadelphia San Francisco
V86/267	DiCarlo, J. October 31, 1986	Mitsubishi International Corp.	82-8-01081, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Baltimore Footwear

Appeal to the U.S. Court of Appeals for the Federal Circuit

British Steel Corp. *v.* United States, 10 CIT ——, Slip Op. 86–104, *appeal docketed,* No. 87–1050 (Fed. Cir. Nov. 3, 1986).

Decisions of the U.S. Court of Appeals for the Federal Circuit

Dow Chemical Co. *v.* United States, 10 CIT ——, Slip Op. 86–85, *dismissed,* No. 87–1041 (Fed. Cir. Nov. 4, 1986).

United States *v.* Federal Insurance Co. 9 CIT ——, Slip Op. 85–32, *reversed & remanded,* No. 85–2343 (Fed. Cir. Nov. 10, 1986).

*U.S. GOVERNMENT PRINTING OFFICE: 1986-181-118:40014

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Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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U.S. Customs Service

T17.6/3-4:

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U.S. Customs Service

Treasury Decisions

19 CFR Part 12

(T.D. 86–203)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO IMPORTATIONS OF MOTOR VEHICLES AND BOATS BY EMPLOYEES OF PUBLIC INTERNATIONAL ORGANIZATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by deleting the privilege previously available to members of the Secretariat of a public international organization to import into the U.S., motor vehicles, boats, or related pieces of equipment exempt from federal emission or safety standards. Currently, more than 15,000 staff personnel of such organizations are eligible to make nonconforming importations and the State Department has determined that the number of exemptions has extended well beyond the intended limits of the program.

The State Department has informed Customs that the exemptions are not required by international law and are no longer warranted. Also, continuation of the exemption program would allow the continued unjustified introduction into the U.S. of motor vehicles and boats which injure the public health and pose an unnecessary risk to the public safety.

Therefore, this document amends the regulations to remove the exemptions available to public international organization employees. In the rare instance when some international agreement might require such a privilege being granted, or to accommodate special circumstances, the regulations allow for individuals who receive special State Department designation to have the privilege of making nonconforming importations. It should also be noted that these amendments in no way prohibit an employee of a public international organization from importing a motor vehicle or boat into the U.S. under other Customs Regulations and having it modified to meet U.S. standards.

EFFECTIVE DATE: December 29, 1986.

FOR FURTHER INFORMATION CONTACT: Louis Alfano, Commercial Division (202–566–5307).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Service, in the discharge of its duties, is often called upon to help enforce some 400 statutory and regulatory requirements on behalf of approximately 40 other Federal agencies. Three such instances are the cooperative efforts of Customs and the Environmental Protection Agency, the National Highway Traffic Safety Administration, and the Coast Guard, respectively, in enforcing regulations pertaining to the importation of motor vehicles, motor vehicle engines, boats, and related equipment. The specific regulations involved are § 12.73, Customs Regulations (19 CFR 12.73), concerning emission standards for imported motor vehicles and engines, § 12.80, Customs Regulations (19 CFR 12.80), concerning safety standards for imported motor vehicles, and § 12.85, Customs Regulations (19 CFR 12.85), concerning safety standards for imported boats.

In all three of these regulations, there are examples of certain types of importations which will be exempted from compliance with the applicable emission or safety standard. Common to all three is the exemption available to members of the Secretariat of a public international organization. The exemptions appear at §§ 12.73(b)(5)(iv), 12.80(b)(1)(vi), and 12.85(c)(5), Customs Regulations (19 CFR 12.73(b)(5)(iv), 12.80(b)(1)(vi), and 12.85(c)(5)). More precisely, the exemption is available to a member of the Secretariat of a public international organization, so designated pursuant to the International Organizations Immunities Act (22 U.S.C. 288), on assignment in the U.S. A list of these organizations is included in § 148.87, Customs Regulations (19 CFR 148.87).

The International Organizations Immunities Act (the IOIA) was passed in 1945 to bring some standardization to the conduct of affairs with public international organizations. The U.S. had been dealing directly with other governments for a very long time, and diplomatic law was fairly well established. However, the U.S. was dealing with other countries through the medium of public international organizations with increasing frequency at this time. The IOIA was the U.S. response to the need for formal methods of dealing with public international organizations. The law was passed with the thought in mind that public international organizations, and the employees thereof, should be granted privileges and immunities similar to, but less extensive, than the privileges and immunities granted to foreign governments and diplomats. This reflected the fact that public international organizations were not foreign governments but were public organizations often carrying on work or research of a governmental nature.

The use of the IOIA in the three Customs Regulations mentioned above had expanded beyond the concept of the law as passed in 1945. It was not a necessary practice to grant employees of public international organizations the right to import nonconforming motor vehicles or boats for personal use. The IOIA was intended to extend privileges and immunities only to official acts of the organization and its employees.

Accordingly, a notice proposing to remove these exemptions was published in the Federal Register on February 7, 1986 (51 FR 4760). In the notice it stated that the State Department had advised Customs that the current exemption program was not required by any international law and was no longer warranted. Over 15,000 staff employees of public international organizations were eligible to import nonconforming motor vehicles, motor vehicle engines, boats, and related pieces of equipment for personal use. The State Department's Office of Foreign Missions informed Customs that this number of exemptions extended well beyond the intended limits of the program. Also contributing to the proposal to eliminate the exemption program was the unnecessary harm inflicted on the U.S. environment by these nonconforming imports and the unnecessary risk they pose to the public safety. Accordingly, §§ 12.73, 12.80, and 12.85 would be amended by removing the exemption available to employees of public international organizations.

To accommodate the rare instance in which a binding international commitment requires that such an exemption be granted, or special circumstances exist, it was proposed to add language to §§ 12.73, 12.80, and 12.85, permitting the State Department to designate individuals who are not foreign government diplomatic personnel, but who are otherwise entitled to import nonconforming motor vehicles, motor vehicle engines, boats or related equipment.

The notice requested public comment on the matter.

Discussion of Comments

Six comments were received in response to the proposal, four from various representatives of the automotive industry, one from a "Legal Foundation", and one from an employee of a public international organization. With the exception of the employee, the commenters were supportive of the amendments for a variety of reasons.

The automotive industry commenters included both domestic and foreign car dealers, and franchised as well as grey-market dealers. All agreed that the exemptions should be removed. All were concerned with the public health and safety threats associated with nonconforming vehicles being allowed to operate on U.S. highways. The franchised dealers of foreign-made vehicles asserted that servicing of nonconforming vehicles is difficult and can damage the reputations of the vehicles they sell and service. Representatives of the grey-market vehicle modifiers and testers expressed concerns that

exempt nonconforming vehicles would be sold in the U.S. and confused with those which had been modified by their members after importation, damaging the reputation of their industry.

The public international organization employee commented that the exemptions should be retained since he believed that far fewer than the 15,000 employees eligible for the exemption actually use it, and therefore it was not a major problem. Customs is of the opinion that the administrative problems experienced by the State Department and the health and safety problems recognized by EPA, NHTSA, and the Coast Guard are very real now, and could only be exacerbated if the exemptions were retained and at some point in the future were used by all eligible employees.

After careful analysis of the comments received, and further consideration of the matter, it has been determined to adopt the amendments as proposed. It should be noted that these amendments in no way prohibit an employee of a public international organization from importing a motor vehicle or boat into the U.S. under other Customs Regulations and having it modified to meet U. S. standards (see § 12.73(b)(5)(x), Customs Regulations (19 CFR 12.73(b)(5)(x)), for example).

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was John Doyle, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List Of Subjects In 19 CFR Part 12

Air pollution control, Marine safety, Motor vehicle pollution, Motor vehicle safety, Motor vehicles.

Amendments to the Regulations

Part 12, Customs Regulations (19 CFR Part 12), is amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624.

§ 12.73 also issued under 19 U.S.C. 1484; 42 U.S.C. 7522, 7601;
§ 12.85 also issued under 19 U.S.C. 1623; 46 U.S.C. 4302, 4306, 4310.

2. Section 12.73(b)(5)(iv) is revised to read as follows:

§ 12.73 Federal motor vehicle air pollution control.

* * * * * * *

(b) * * *

(5) * * *

(iv) Such motor vehicle or motor vehicle engine is not covered by a certificate of conformity with Federal motor vehicle emission standards, and the importer or consignee is a member of the armed forces of a foreign country on assignment in the U.S. or is a member of the personnel of a foreign government on assignment in the U.S. or other individual who comes within the class of persons for whom free entry of motor vehicles has been authorized by the Department of State in accordance with general principles of international law and that such vehicle or engine will not be sold in the U.S.; or

* * * * * * *

3. Section 12.80(b)(1)(vi) is revised to read as follows:

§ 12.80 Federal motor vehicle safety standards.

* * * * * * *

(b) * * *

(1) * * *

(vi) The importer or consignee is a member of the armed forces of a foreign country on assignment in the U.S. or is a member of the personnel of a foreign government on assignment in the U.S. or other individual who is within the class of persons for whom free entry of vehicles has been authorized by the Department of State in accordance with general principles of international law, is importing the vehicle or equipment item for purposes other than resale; and a copy of his official orders, if any, is attached to the declaration (or, if a qualifying member of the personnel of a foreign government on assignment in the U.S., the name of the Embassy to which he is accredited is stated on the declaration).

* * * * * * *

4. Section 12.85(c)(5) is revised to read as follows:

§ 12.85 Coast Guard boat and associated equipment safety standards.

* * * * * * *

(c) * * *

(5) *Products owned by certain foreign governments.* In the case of an importer or consignee employed in one of the capacities set forth in this subparagraph, a declaration will be filed in accordance with paragraph (d) of this section. The declaration shall state that the importer or consignee is either a member of the armed forces of a foreign country on assignment in the U.S. or is a member of the personnel of a foreign government on assignment in the U.S. or other individual who comes within the class of persons for whom free entry of boats has been authorized by the Department of State in accordance with general principles of international law, and that he is importing the product for purposes other than resale.

* * * * * * *

WILLIAM VON RAAB,
Comissioner of Customs.

Approved: November 12, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 28, 1986 (51 FR 42996)]

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19 CFR Parts 113 and 141

(T.D. 86-204)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO BONDS AND POWERS OF ATTORNEY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to clarify that bonds submitted by limited partnerships need only have the firm name and the names of the general partners authorized to bind the firm placed on the bonds. Also, the regulations are being clarified to provide that limited partnerships need only name the general partners who have authority to bind the firm, on a power of attorney, unless the partnership agreement provides otherwise. These amendments are necessary inasmuch as the existing regulations only treat the subject of partnerships generally and do not differentiate between the ordinary partnerships and a limited partnership.

EFFECTIVE DATE: November 28, 1986.

FOR FURTHER INFORMATION CONTACT: Jerry C. Laderberg, Entry Procedures and Penalties Division (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 113.32(a), Customs Regulations (19 CFR 113.32(a)), provides that unless written notice of the full names of all partners in the firm has been previously filed with the district director or regional commissioner (of Customs) in the case of a bond relating to repayment of erroneous drawback payment, the names of all persons composing the partnership shall appear in the body of the bond. Section 141.39(a), Customs Regulations (19 CFR 141.39(a)), similarly provides for the names of all members of a partnership on a power of attorney granted by a partnership. The rationale for the naming of the partners on the bond, as noted in § 113.32(c), is that when a bond is executed by any member of the partnership, it shall be binding on the other partners in like manner and to the same extent as if such other partners had personally joined in the execution, pursuant to § 495, Tariff Act of 1930, as amended (19 U.S.C. 1495).

These requirements make no distinction between an ordinary partnership and a limited partnership. In the ordinary partnership, all the partners are personally liable for the debts of the partnership and are bound by the actions of each other.

In a limited partnership, the limited partners are liable for the debts of the partnership only in an amount not exceeding their investment in the partnership. Also, they are not bound by the actions of any other partner in the firm, except as provided for in the partnership agreement. The general partners in a limited partnership, however, usually have the same liabilities as the general partners in the ordinary partnership.

In return for the limited liability of the limited partner, his activities in the partnership are restricted. In fact, his name may not even appear in the business name of the partnership. Because of the extensive responsibility of the general partner, however, it is necessary for his name to be included in all documents of the partnership, as well as on bonds and powers of attorney.

ACTION

Because of the substantially different liabilities of limited partners, Customs believes that the regulations concerning the naming of all partners on bonds and powers of attorney should be amended to require, with respect to limited partnerships, only the name of the firm and the names of the general partners who have authority to bind the partnership on the bond or power of attorney (unless the partnership agreement provides otherwise with respect to a power of attorney), and to exempt the limited partners from being bound by the actions of other partners in the firm, except as provided for in the partnership agreement. Also, a copy of this agreement will be

required to be submitted with each bond executed by the partnership, or each power of attorney submitted by it.

Accordingly, §§ 113.32(a) and (c), and § 141.39(a), Customs Regulations, are amended to reflect these changes.

The amendments are in conformity with existing Customs policy which requires only the names of the general partners in a limited partnership who have authority to bind the firm, on a Customs bond or power of attorney. This policy was expressed in a Customs Headquarters ruling dated February 15, 1985 (723977JLF).

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Inasmuch as these amendments merely clarify existing regulations, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), notice and solicitation of comments is unnecessary and good cause is found for dispensing with a delayed effective date for adoption of the amendments.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the "Regulatory Flexibility Act" (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulation, such as this, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 113 AND 141

Customs duties and inspection, Customs bonds and principals, Powers of attorney.

AMENDMENTS TO THE REGULATIONS

Parts 113 and 141, Customs Regulations (19 CFR Parts 113, 141), are amended as set forth below.

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

Subpart E also issued under 19 U.S.C. 1484.

2. Section 113.32 is amended by revising paragraphs (a) and (c) to read as follows:

§ 113.32 Partnerships as principals.

(a) *Names of partners on the bond.*

(1) *In general.* Unless written notice of the full names of all partners in the partnership has been previously filed with the district director, or regional commissioner in the case of a bond relating to repayment of erroneous drawback payment, the names of all persons composing the partnership shall appear in the body of the bonds. (2) *Limited partnerships.* Bonds submitted by limited partnerships need only have the firm name and the names of the general partners authorized to bind the firm on them. The bond must be accompanied by a copy of the partnership agreement. For this purpose, a partnership or a limited partnership means any business association recognized as such under the laws of the state where the association is organized.

(b) * * *

(c) *Action of one principal binding on all principals of the partnership.* Pursuant to § 495, Tariff Act of 1930, as amended (19 U.S.C. 1495), when a bond is executed by any member of the partnership, the bond shall be binding on the other partners in like manner and to the same extent as if such other partners had personally joined in the execution. However, in the case of a limited partnership, the limited partners will not be bound by the actions of any other partner in the firm, except as provided for in the partnership agreement.

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

Subpart G also issued under 19 U.S.C. 1505.

2. Section 141.39(a) is revised to read as follows:

§ 141.39 Partnerships.

(a) (1) *General.* A power of attorney granted by a partnership shall state the names of all members of the partnership. One member of the partnership may execute a power of attorney in the name of the partnership for the transaction of all its Customs business. (2) *Limited partnerships.* A power of attorney granted by a limited partnership need only state the names of the general partners who have authority to bind the firm unless the partnership agreement provides otherwise. A copy of the partnership agreement must accompany the power of attorney. For this purpose, a partnership or limited partnership means any business association recognized as such under the laws of the state where the association is organized.

* * * * * * *

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: November 10, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 28, 1986 (51 FR 42997)]

U.S. Customs Service

General Notice

APPLICATION FOR RECORDATION OF TRADE NAME: "ALASKAN SEAFOOD COMPANY"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12) for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "ALASKAN SEAFOOD COMPANY" used by the Alaskan Seafood Company, a corporation organized under the laws of the state of Arizona, located at 1827 W. Mission Drive, Chandler, Arizona 85224.

The application states that the trade name is used in connection with fresh frozen seafood, manufactured in Mexico and the United States.

Before final action is taken of the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before January 26, 1987.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Beatrice E. Moore, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202–566–5765).

DATED: November 21, 1986.

DONALD W. LEWIS,
Director, Entry Procedures
and Penalties Division.

[Published in the Federal Register, November 26, 1986 (51 FR 42966)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85–2776)

TEXAS INSTRUMENTS, INC., APPELLANT *v.* INTERNATIONAL TRADE COMMISSION, APPELLEE

James F. Davis, Howrey and Simon, of Washington, D.C., argued for appellant. With him on the brief was *Kenneth E. Krosin*. Also on the brief were *Melvin Sharp*, *Richard L. Donaldson* and *David V. Carlson*, Texas Instruments, Inc., of Dallas, Texas.

Wayne W. Herrington, Office of the General Counsel, of U.S. International Trade Commission, of Washington, D.C., argued for appellee. With him on the brief were *Lyn N. Schitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85–2776)

TEXAS INSTRUMENTS, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

(Decided November 19, 1986)

Before DAVIS, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*.

NEWMAN, *Circuit Judge*

In this action brought under section 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337, Texas Instruments, Inc. ("TI") appeals the final decision of the United States International Trade Commission. The Commission held that there was no statutory violation in that TI's U.S. Patent No. 3,819,921 (" '921 patent") was not infringed by certain imported calculators, and that there was no industry in the United States practicing an invention covered by any claim of the '921 patent.[1] We affirm the decision of non-infringement, and thus do not reach the issue of whether there was injury to a domestic industry.

[1] *In re Certain Portable Electronic Calculators*, Inv. No. 337-TA-198, USITC Pub. No. 1732 (July 1985).

COMMISSION PROCEEDINGS

Texas Instruments alleged unfair methods of competition and unfair acts in the importation and sale of certain portable electronic calculators, based on the infringement of claims 1, 2, 6, 7, 30, 37, 41 and 53 of the '921 patent, and that the effect or tendency of the unfair methods and acts was to destroy or substantially injure an efficiently and economically operated industry in the United States. The Commission ordered an investigation. 49 Fed. Reg. 29,162 (1984). Twenty-one respondents were named. For details as to the parties and the proceedings, reference is made to the Commission's decision, familiarity with which is presumed. Three respondents settled with TI during the course of the proceedings, and respondents Nam Tai Electronics Co. Ltd., International Merchandising Associates Hong Kong, and Enterprex appeared at the hearing. Nam Tai subsequently settled with TI, taking worldwide licenses to all of TI's calculator patents including the '921 patent.

In the initial determination of April 18, 1985, the administrative law judge ("ALJ") considered first the defense of patent invalidity under 35 U.S.C. §§ 103 and 112, and held that the claims at issue had not been proven invalid, stating: "The presumption of validity afforded those claims under 35 U.S.C. § 282 remains unrebutted and in full effect." The Commission affirmed, and this aspect of the decision has not been appealed.

The ALJ held that TI had not sustained its burden of proving that any of the patent claims was infringed by any of the imported calculators, and that because "complainant does not produce calculators in accordance with the claims in issue of the '921 patent, no domestic industry exists." The Commission adopted these determinations. None of the respondents participated in this appeal. The Commission is the sole appellee, and appears to defend the merits of its decision.

A

The '921 patent entitled "Miniature Electronic Calculator" was issued on June 25, 1974 to inventors Jack S. Kilby, Jerry D. Merryman and James H. Van Tassel, assignors to Texas Instruments. The '921 patent derives, through a series of continuation applications, from application Serial No, 671,777 filed September 29, 1967. It represents a pioneering invention, for which the inventors and TI have been recognized. The prototype calculator was accepted for the permanent collection of the Smithsonian's Museum of History and Technology. Patent claim 1 is representative:

1. A miniature, portable, battery operated electronic calculator comprising:

a. input means including a keyboard for entering digits of numbers and arithmetic commands into said calculator and generating signals corresponding to said digits and said com-

mands, the keyboard including only one set of decimal number keys for entering plural digits of decimal numbers in sequence and including a plurality of command keys;

b. electronic means responsive to said signals for performing arithmetic calculations on the numbers entered into the calculator and for generating control signals, said electronic means comprising an integrated semiconductor circuit array located in substantially one plane, the area occupied by the integrated semiconductor array being no greater than that of the keyboard, said integrated semiconductor circuit array comprising:

i. memory means for storing digits of the numbers entered into the calculator,

ii. arithmetic means coupled to said memory means for adding, subtracting, multiplying and dividing said number and storing the resulting answers in the memory means, and

iii. means for selectively transferring numbers from the memory means through the arithmetic means and back to the memory means in a manner dependent upon the commands to effect the desired arithmetic operation;

c. means for providing a visual display coupled to said integrated semiconductor circuit array and responsive to said control signals for indicating said answer; and

d. the entire calculator including keyboard, electronic means, means for providing a visual display, and battery being contained within a "pocket sized" housing.

The specification contains a detailed description of the then preferred means of performing each step of the claims. In the seventeen years between the first filing of the patent applications and filing of the complaint with the Commission, each such means has undergone technological advance. TI asserts that the means used in the accused calculators perform the functions that are specifically set forth in the '921 claims, and that by correct claim interpretation these claims are infringed because the means used in the accused calculators are substantially the same as, or equivalent to, the means illustrated in the specification.

The Commission adopted the ALJ's extensive findings and conclusions, wherein the ALJ construed the claims in light of the specification and found no claim infringed, either literally or in terms of the doctrine of equivalents.

TI argues that substantial evidence does not support the finding of non-infringement, in that the invention as embodied in the accused calculators is fundamentally the same as that of the '921 claims, that the '921 patent represents the giant step in the development of semiconductor technology and integrated circuitry on which is based the entire industry of hand-held calculators, and that the claims are not restricted to the preferred embodiments as they existed at the time the patent application was filed.

TI points to the established law that it is not necessary that the specification have described or that the inventors have foreseen specific means now used to perform each of the functions of the claims. TI emphasizes that this basic patent on a pioneering invention is entitled to be interpreted broadly, and indeed this proposition is long-established, *see, e.g., Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U.S. 405, 415 (1908).

Analysis of patent infringement entails two inquiries: determination of the scope of the claims, as a matter of law; and the factual finding of whether properly construed claims encompass the accused structure.[2] *Mannesmann Demag Corp.* v. *Engineered Metal Products Co.*, 793 F.2d 1279, 1282, 230 USPQ 45, 46 (Fed. Cir. 1986); *Caterpillar Tractor Co.* v. *Berco, S.P.A.*, 714 F.2d 1110, 1114, 219 USPQ 185, 187 (Fed. Cir. 1983). This analytical framework applies whether claims are asserted to be infringed literally or by application of the doctrine of equivalents.

Literal infringement requires that the accused device embody every element of the claim as properly interpreted. *Mannesmann*, 793 F.2d at 1282, 230 USPQ at 46; *Stewart-Warner Corp.* v. *City of Pontiac*, 767 F.2d 1563, 1570, 226 USPQ 676, 681 (Fed. Cir. 1985). If the claim describes a combination of functions, and each function is performed by a means described in the specification or an equivalent of such means, then literal infringement holds. *See D.M.I., Inc.* v. *Deere & Co.*, 755 F.2d 1570, 1575, 225 USPQ 236, 239 (Fed. Cir. 1985). This prescription derives from 35 U.S.C. § 112 paragraph 6:

> An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

The statute thus provides, and extensive judicial analysis has reinforced, that when the claimed invention is a novel combination of steps, all possible methods of carrying out each step of the combination are not required to be described in the specification. Correctly construed claims cover "equivalents of the described embodiments". *King Instrument Corp.* v. *Otari Corp.*, 767 F.2d 853, 862, 226 USPQ 402, 408 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986); *see also Palumbo* v. *Don-Joy Co.*, 762 F.2d 969, 974, 226 USPQ 5, 8 (Fed. Cir. 1985); *D.M.I.*, 755 F.2d at 1579, 225 USPQ at 238.

The purpose is to grant the inventor of a combination invention a fair scope that is not dependent on a catalogue of alternative embodiments in the specification. This court has cautioned against limiting the claimed invention to preferred embodiments or specific examples in the specification. *Palumbo*, 762 F.2d at 977, 226 USPQ at

[2] Factual findings of the Commission are reviewed to determine whether they are supported by substantial evidence. 19 U.S.C. § 1337(c); 5 U.S.C. § 706. Legal conclusions are reviewed for correctness.

10. The details of performing each step need not be included in the claims unless required to distinguish the claimed invention from the prior art, or otherwise to specifically point out and distinctly claim the invention. 35 U.S.C. § 112 paragraph 2; *In re Lundberg,* 244 F.2d 543, 547–48, 113 USPQ 530, 534 (CCPA 1957); *In re Arbeit,* 206 F.2d 947, 958, 99 USPQ 123, 131–32 (CCPA 1953).

These principles are not unlimited in their application, but reflect the equitable concept that claims should be read in a way that avoids enabling an infringer to "practice a fraud on a patent." *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.,* 339 U.S. 605, 608, 85 USPQ 328, 330 (1950). It has long been recognized that the range of permissible equivalents depends upon the extent and nature of the invention, and may be more generously interpreted for a basic invention than for a less dramatic technological advance. *Continental Paper Bag Co.,* 210 U.S. at 414; *Miller* v. *Eagle Manufacturing Co.,* 151 U.S. 186, 207 (1894). The questions of claim interpretation raised in this case turn on the issue of the breadth of equivalents to which the claims are entitled. As in many aspects of patent law, the legal conclusions ar intertwined with, and depend upon, the technological facts.

It is not required that those skilled in the art knew, at the time the patent application was filed, of the asserted equivalent means of performing the claimed functions; that equivalence is determined as of the time infringement takes place. *Atlas Powder Co.* v. *du Pont de Nemours & Co.,* 750 F.2d 1569, 1581, 224 USPQ 409, 417 (Fed. Cir. 1984); *see also American Hospital Supply Corp.* v. *Travenol Laboratories, Inc.,* 745 F.2d 1, 8, 223 USPQ 577, 583 (Fed. Cir. 1984) ("the Commission erred in determining equivalence at the time of invention without regard to subsequent developments in the art"). Technological "embellishment" made possible by the patent's disclosure "does not allow the accused [device] to escape the 'web of infringement' ". *Hughes Aircraft Co.* v. *United States,* 717 F.2d 1351, 1365, 219 USPQ 473, 483 (Fed. Cir. 1983) (quoting *Bendix Corp.* v. *United States,* 600 F.2d 1364, 1382, 204 USPQ 617, 631 (Ct. Cl. 1979).

Devices that have been modified to such an extent that the modification may be separately patented may nonetheless infringe the claims of the basic patent. *See Atlas Powder,* 750 F.2d at 1580, 224 USPQ at 417 (infringement will be found where the material features of the patent have been appropriated, even when these features have been patentably improved). Similarly, the modification of an accused device does not negate infringement when that device has adopted the features of the claims or their equivalents. *See Radio Steel & Manufacturing Co.* v. *MTD Products, Inc.,* 731 F.2d 840, 847–48, 221 USPQ 657, 663–64 (Fed. Cir.), *cert. denied,* 105 S. Ct. 119 (1984) (modification of feature to perform equivalent function held as infringement, as is appropriation of patented feature to perform an additional function); *Amstar Corp.* v. *Envirotech Corp.,* 730

F.2d 1476, 1482, 221 USPQ 649, 653 (Fed. Cir.), *cert. denied,* 105 S. Ct. 306 (1984) (quoting *McCullough Tool Co.* v. *Well Surveys, Inc.,* 343 F.2d 381, 402, 145 USPQ 6, 22 (10th Cir. 1965), *cert. denied,* 383 U.S. 933 (1966) ("infringement cannot be avoided by the mere fact that the accused device is more or less efficient or performs additional functions")).

TI argues that the Commission required too narrow a construction of the '921 patent claims, contrary to this body of precedent, so that the Commission in effect limited the claims to the means that were illustrated in the specification. As stated in *D.M.I.*:

> To interpret "means plus function" limitations as limited to a particular means set forth in the specification would be to nullify the provision of § 112 requiring that the limitation *shall* be construed to cover the structure described in the specification *and* equivalents thereof. Patentees are required to disclose in the specification some enabling means for accomplishing the function set forth in the "means plus function" limitation.

755 F.2d at 1574, 225 USPQ at 238 (emphasis in original). Pertinent is the court's holding that

> there is and can be no requirement that applicants describe or predict every possible means of accomplishing that function.

Id. TI asserts that the accused devices perform all the steps of the claims, and that the detailed means by which these steps are carried out, where not described or predicted by the patentees, are the same as or equivalent to the means described in the specification.

The ALJ considered each step of the claims, and made extensive findings as to the structure and operation of the accused calculators in comparison with that described in the '921 specification. The ALJ's findings on the structure of the various devices are generally uncontroverted on this appeal, but his findings as to their operation, as well as his construction of the claims, are contested as is the conclusion of noninfringement.

In brief summary, either the ALJ found, or it was uncontested, that each of the accused calculators was a miniature, portable, battery operated device contained within a "pocket-sized" housing (preamble and clause d of claim 1); having a keyboard for entering digits of numbers and arithmetic commands into the calculator (clause a); an integrated semiconductor circuit located in substantially one plane and having memory, arithmetic, and transfer means (clause b and subclauses i, ii, and iii); and a visual display (clause c). The ALJ found that each of the functions of clauses a, b, and c was performed in the accused devices by a means that was not described in the '921 patent, and that each such means was not equivalent to the means shown in the specification. Although we conclude that substantial evidence did not support each such determination of nonequivalence as to each claim clause considered separately, we con-

clude that the accused devices do not infringe properly construed claims when the invention and the accused devices are viewed as a whole.

The ALJ's analysis of each "means" clause is pertinent to this determination:

CLAUSE a—INPUT MEANS

The keyboard input means of the '921 patent, described in claim 1 as "including only one set of decimal number keys", was distinguished from the prior art decade-type keyboards during prosecution before the Patent Office. It was uncontroverted that the prior art described no calculator keyboard that functioned with a single set of decimal keys.

All of the accused calculators have the claimed "one set of decimal number keys". TI argues that this distinction is fundamental to its design of a miniature calculator, and is the only critical limitation to the input means, whereas the specific mode of internal operation of the keyboard is not limited to that illustrated in the specification.

The '921 specification describes a mechanism for the keyboard operation whereby pressure on a key causes a conductive layer on the underside of the key to contact and short circuit conductive strips lying underneath, to produce a unique binary signal that is encoded and transmitted. An alternative embodiment is described having a conductive pattern wherein signal encoding is accomplished by the calculator memory logic. The keyboard encoder, a separate invention of Jack S. Kilby and James H. Van Tassel, is patented as U.S. Patent No. 3,696,411, the entire disclosure of which is incorporated by reference into the '921 patent.

Clause a of Claim 1 is specific to a keyboard input means for entering digits and commands and generating signals corresponding thereto. TI observes that the prosecution history does not limit the keyboard input means beyond the limitation to one set of decimal keys, which the accused keyboards all have. Experts on both sides agreed that the keyboards of the accused devices and of the '921 specification entered digits and commands and generated corresponding binary signals, but by a different internal mechanism. The accused keyboards use a scanning matrix encoder, which scans the keyboard at clock intervals in order to determine which key is depressed. Scanning matrix systems are described in Caudel and Raymond U.S. Patent No. 4,021,656, entitled "Data Input for Electronic Calculator or Digital Processor Chip", filed November 19, 1974 and issued May 3, 1977. This patent, assigned to Texas Instruments, is not asserted in this action.

The ALJ found that in a scanning matrix system the keyboard does not generate unique signals corresponding to digits and commands, and thus that the keyboard systems are not equivalent because they do not operate in substantially the same way. TI asserts

that this finding is not supported by substantial evidence and reflects incorrect claim construction as a matter of law. TI asserts that claim clause a reads literally on the accused keyboards and that the internal operation of the keyboard is not material because the claimed invention lies in the "operation of the keyboard in the calculator combination to operate a unique signal for each key", not in the details of each step. Inventor Kilby described the scanning matrix as a "new invention", but testified that there is no change in the elements of the calculator:

> In all cases the elements of the calculator remain basically the same, although the costs have been significantly reduced. Most of these reductions have come about because of economies of scale in production and a move to lower cost labor areas. In other cases new inventions have contributed to the reduction in cost. An example of this would be in the keyboard. As the cost logic was reduced, it became economically desirable to reduce the interconnections required for the chip at the expense of increased logic. The scanning keyboard is one example of this practice [clause a], while another can be found in the current means of driving the display [clause c]. Neither change has any impact on the operation of the calculator. Depressing the "2" key still sends a unique signal meaning "2" to the calculator. The calculator would be useless if it did not.

TI argues that the Commission made a fundamental error in claim construction by requiring that the means of performing the input be technologically as well as functionally identical. TI states that the Commission erroneously required scientific equivalence of the keyboards' internal operations. TI emphasizes that the invention of the '921 patent lies in the claimed combination, that the essential elements of the invention are contained in the claims, and that the accused devices also contain these elements. TI argues that the Commission erred as a matter of law in limiting the '921 claims to the specific input means illustrated in the specification, and they by determining absence of infringement on the basis of this limitation.

Clause b—Electronic Means

The "electronic means" is claimed as an "integrated semiconductor circuit array", a phrase coined by the inventors, for "performing arithmetic calculations on the numbers entered into the calculator and for generating control signals". The claims require that the array be located in substantially one plane, and be no larger than the keyboard. The specification shows an array of four integrated semiconductor circuits, three integrated semiconductor shift registers, and two resistors, interconnected by printed conductors located in one plane on an insulating substrate. An alternative embodiment in the specification, and claimed specifically in claim 2, locates the array on a single semiconductor wafer.

The integrated semiconductor array provides the logic of the calculator, performing the arithmetic, memory, and transfer functions set forth in sub-clauses i, ii, and iii of clause b. The specification describes each integrated circuit, in detail, as having a series of interconnected gates or logic circuits, constructed of, *inter alia,* bipolar transistors. The shift registers also use bipolar transistors. The shift register is the subject of a separate TI patent of Jerry D. Merryman entitled "Information Transfer System", U.S. Patent No. 3,573,754, incorporated by reference into the '921 disclosure.

The ALJ held that the "integrated semiconductor circuit array" of the '921 claims was limited to "a plurality of distinct, circuit structures or components that are electrically interconnected, each individual circuit structure or component of the array, whether the array is on a wafer or a plurality of wafers, having its own functional identity and separate in space"; that is, the specific structure described in the '921 specification. The ALJ found that the accused calculators all use a single integrated circuit, and concluded that there was neither identity nor equivalence of means for performing the electronic function.

TI asserts that this holding is incorrect as a matter of claim construction, and also that the finding of non-equivalence is not supported by substantial evidence. TI argues that as illustrated in the specification the electronic means may be an arrangement of four integrated semiconductor circuits and three integrated semiconductor shift registers in one plane smaller than the keyboard or, alternatively, a single wafer containing on it the four circuits and three shift registers. TI describes the corresponding electronic means in the accused devices as a single semiconductor wafer or chip using integrated circuitry. All perform arithmetic calculations and generate control signals using integrated circuitry. TI points out that the prosecution history of the '921 claims does not require the restricted definition of "integrated semiconductor circuit array" that was imposed by the ALJ.

All parties agree that there have been many improvements in the miniaturization of integrated circuitry and advances in semiconductor technology. Witnesses on both sides agreed that the electronic means of the accused devices and that described in the '921 patent use integrated semiconductor circuitry. TI argues that the difference between the semiconductor circuitry of the accused devices and the semiconductor circuit array of the '921 patent is "simply size", that both are located in substantially one plane as the claims require, and perform the arithmetic, memory and transfer functions of the claims.

The ALJ also found that because the '921 patent specification describes only bipolar transistors, the use of metal oxide semiconductor ("MOS") transistors in the accused calculators serves to avoid infringement. The '921 specification does not mention metal oxide semiconductors, but neither does it limit the semiconductor to the

bipolar form. There was unrebutted testimony by inventor Merryman that metal oxide semiconductors were known at the time the '921 invention was made, and were rejected as the best mode then known "since MOS was not yet reliable". Respondents' expert testified that MOS and bipolar transistors are made from the same basic semiconductor materials, but that MOS transistors have the advantage of not requiring a constant flow of current for logic functions as do bipolar. It was also uncontroverted that MOS transistors have now replaced bipolar transistors as the switch of choice in the circuitry of miniaturized calculators. TI argues that the claims of the '921 patent were erroneously construed as limited to bipolar transistors, because the two types of transistors "function in the same way in calculator digital circuits, i.e., as electronic switches", and that MOS transistors were a known alternative to bipolar transistors, as demonstrated by U.S. Patent No. 3,453,601 entitled "Two Speed Arithmetic Calculator", assigned to Philco Ford, filed October 18, 1966 and issued July 1, 1969. TI asserts that the "invention of the '921 patent resides in the achievement of a threshold size and power consumption; transistors which meet these threshold requirements are interchangeable".

The ALJ found that TI's prototype calculator "was built with bipolar or discrete technology using discretionary wiring". TI argued the interchangeability of the electronic means on the basis of a Japanese publication describing a desk calculator, and on the basis of the ready conversion of bipolar circuitry to MOS. The ALJ found that MOS and bipolar transistor technologies are not interchangeable because of differences in surface area and power consumption. The ALJ thus found the electronic means of the accused calculators not equivalent to that described in the '921 specification or within the scope of the '921 claims.

Clause c—Display Means

The display means receives information from the keyboard and the electronic means and converts it into a visual display. The visual display is not limited in claim 1 to any particular form, but is shown in the specification as a thermal printer with semiconductor heater elements which are selectively energized to create dots on a tape in the form of numbers or symbols. The accused devices all use liquid crystal displays ("LCD").

The thermal printer is specifically claimed in this overall combination in claim 4 of the '921 patent, not here asserted. The thermal printer is separately patented by TI in U.S. Patent No. 3,501,615 entitled "Integrated Heater Element Array and Drive Matrix", inventors Jerry D. Merryman and Edward M. Ruggiero, incorporated by reference in the '921 specification.

The ALJ construed the scope of clause c to be limited to the thermal printer, and held that the LCDs of the accused devices are not the same as or equivalent to the thermal printer. As found by the

ALJ, an LCD consists of two glass electrode-coated sheets between which is sealed a liquid crystalline material; the application of voltage between the electrode coatings effects the arrangement of molecules in the material to form visible characters. The ALJ distinguished the thermal printer from the LCD in its method of operation, finding that the printer produces a hard copy requiring a continuous input of paper, while the LCD has a continuously pulsed line segment display. Inventor Kilby testified that he had never seen a thermal printer on either a thin "credit card" or a solar powered calculator. On the basis of the inventor's testimony and that of the respondents' technical expert, the ALJ concluded that the greater size and power requirements of the thermal printer precluded equivalence with the LCD.

TI argues that the ALJ applied an incorrect standard by focusing on the differences in operation, and that the correct standard was whether the LCD served as a visual display means in the claimed combination. Inventor Kilby testified that the use of a LCD was merely a functional substitution of one display means for another, and that after the LCD was developed its replacement of the thermal printer was a matter of ordinary skill. Kilby testified that cathode ray tubes, "nixie" tubes, light emitting diodes, and LCDs are all examples of visual displays, and that:

> In their physical embodiments they have nothing in common, but all are readable by the eye. So is a printed output. All are visual displays and fully within the '921 patent.

TI argues that the ALJ erred in limiting claim 1 to the thermal printer specifically claimed in claim 4, citing *Palumbo*. 762 F.2d at 977, 226 USPQ at 10, and the "immutable and universally applicable" rule of claim differentiation of *D.M.I.*, 755 F.2d at 1574, 225 USPQ at 239. The Commission argues that the ALJ did not read the limitation of claim 4 into claim 1, but rather interpreted the visual display means of claim 1 as limited to the thermal printer described in the specification and its equivalents. The Commission asserts that none of the accused devices uses any kind of printer, and that "[i]t is manifest that an LCD display is not equivalent to the '921 thermal printer".

The Invention as a Whole

The '921 patent claims are all written in the form appropriate to a multi-step combination invention, wherein each step of a novel combination is described in terms of its function in the total combination. Each such function is presented in the "means" form contemplated by 35 U.S.C. § 112 paragraph 6, and each such means is illustrated in the specification in accordance with the statutory requirement under 35 U.S.C. § 112 paragraph 1 to set forth the best mode then known to the inventors.

TI correctly states and the ALJ so found, that every function described in the '921 patent claims is performed by the accused calcu-

lators. There was not substantial evidence to the contrary. The ALJ, finding that each of the means of performing these functions in the accused calculators embodied, to varying degrees, new or improved technology over that known or developed at the time the '921 patent application was filed, held that the means of each step was not equivalent to that shown in the specification, and thus found the claims not infringed. As a matter of law, subsequent improvements do not in themselves preclude a finding of infringement. *Atlas Powder,* 750 F.2d at 1580–81, 224 USPQ at 417; *Hughes Aircraft,* 717 F.2d at 1365, 219 USPQ at 483.

We conclude that the ALJ interpreted the claims too narrowly when he, in effect, limited each means to the embodiment shown in the specification. As stated in *D.M.I.*:

> The statute, § 112–6, was written precisely to avoid a holding that a means-plus-function limitation must be read as covering only the means disclosed in the specification.

755 F.2d at 1574, 225 USPQ at 238. *See also Radio Steel,* 731 F.2d at 848, 221 USPQ at 663 (quoting *Lockheed Aircraft Corp.* v. *United States,* 553 F.2d 69, 82, 193 USPQ 449, 460 (Ct. Cl. 1977) ("where a claim sets forth a means for performing a specific function, without reciting any specific structure for performing that function, the structure disclosed in the specification must be considered, and the patent claim construed to cover both the disclosed structure and equivalents thereof")).

As an aid in determining the breadth of equivalents to be afforded means plus function clauses under section 112, the prosecution history, the other claims in the patent, expert testimony, and the language of the asserted claims may be considered in addition to the specification. *King Instrument,* 767 F.2d at 862, 226 USPQ at 408; *Palumbo,* 762 F.2d at 975, 226 USPQ at 8. The pioneer status of the invention also requires consideration. *Continental Paper Bag,* 210 U.S. at 415. As explained in *Claude Neon Lights, Inc.* v. *E. Machlett & Son,* 36 F.2d 574, 576 (2d. Cir. 1929) (L. Hand, J.), *cert. denied,* 281 U.S. 741 (1930):

> [T]he claim is not to be taken at its face—however freely construed—but its elements may be treated as examples of a class which may be extended more or less broadly as the disclosure warrants, the prior art permits, and the originality of the discovery makes desirable.
>
> * * * * * * *
>
> The usual ritual, * * * that the same result must follow by substantially the same means, does not help much in application; it is no more than a way of stating the problem. Any decision is therefore bound to have an arbitrary color, as in all close cases of interpretation * * *.

While the scope of patent claims under section 112 paragraph 6, is a legal determination, it is not devoid of equitable considerations, par-

ticularly when determining the breadth of "means" claims on complex and rapidly-evolving technologies. Thus it has long been recognized, as affirmed in *Graver Tank*, 339 U.S. at 609:

> Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalents, things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalents. Consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with the other ingredients, and the function which it is intended to perform.

However, this does not mean that there is no limit on changed means of performing a claimed function, such that literal infringement can never be avoided. There must be outer boundaries to the scope of these rules, as for most rules, when the factual situation strains their rote application and requires a fresh look at the rules in the new context in which they are presented. There is no abstract guide to determining when a modified device crosses the boundary with respect to the reasonable scope of patent claims. Indeed, the determination of infringement is not made in the abstract, but in the context of the claimed invention and the accused devices. *Graver Tank*, 339 U.S. at 607; *Amstar Corp.* v. *Envirotech Corp.*, 730 F.2d at 1481–82, 221 USPQ at 653.

TI argues eloquently that consideration of the breadth of equivalents for its pioneering invention requires emphasis on the function of each step of the combination as claimed, and not on the specific means of performing each step that is set forth in the patent's disclosure. Before the Commission TI asserted that the '921 invention created a totally new market for electronic calculating devices, that there is nothing remotely similar in the prior art, and that "[t]his portable, miniature, battery operated calculator is a dramatic advance deserving pioneer status." Indeed, we agree.

TI asserts that the correct interpretation of the '921 claims does not limit the claims to the means described in the specification and to those equivalents that are operationally identical, but extends to include corresponding means that perform substantially the same function in substantially the same way to obtain the same result within the combination of the claims. We agree, and as we have stated, we conclude that when each changed means is considered separately, as part of the overall device as described by the inventors, substantial evidence may not support the finding that the resultant device is not an infringement of the '921 claims. However, this is not the situation before us.

Mindful of the admonition so often urged by us, it is the claimed invention as a whole that must be considered in determining whether there is infringement by the accused devices also considered as a

whole. It is not appropriate in this case, where all of the claimed functions are performed in the accused devices by subsequently developed or improved means, to view each such change as if it were the only change from the disclosed embodiments of the invention. It is the entirety of the technology embodied in the accused devices that must be compared with the patent disclosure. *D.M.I.*, 755 F.2d at 1575, 225 USPQ at 239; *see also Hughes Aircraft*, 717 F.2d at 1363–64, 219 USPQ at 482–83. Any other view distorts both the correct interpretation of the claims and their application to the accused devices.

The ALJ observed that it was not entirely clear from the record before him whether all the accused calculators embodied all of the technological changes here discussed. We have not considered the infringement status of calculators containing fewer modifications than those discussed by the ALJ, but have based our conclusion on the accused devices generally found by the ALJ. We do not pass at all on the infringement status of devices embodying less than the full combination of changes.

TI observes that in *Decca Ltd.* v. *United States*, 544 F.2d 1070, 191 USPQ 439 (Ct. Cl. 1976), *confirmed in part, modified in part*, and *overturned in part*, 640 F.2d 1156, 209 USPQ 52 (Ct. Cl. 1980), *cert. denied*, 454 U.S. 819 (1981), *Lockheed*, and *Hughes Aircraft*, the courts held a digital computer equivalent to an analog computer even though the digital computer was an improvement, because both performed the same function in the claimed electronic systems. By analogy, TI argues that in "fast-moving" arts infringers should not be permitted to avoid liability by arguing that the improved elements substituted in the patented combination operate in a different "way." TI asserts that to fail to find infringement under these circumstances "will emasculate electronics patents by limiting the scope of their claims to the specific embodiments disclosed in the specification."

The '921 specification describes the calculator as having the dimensions 4-¼ inches by 6-⅛ inches by 1-¾ inches, and weighing 45 ounces, providing "a miniature portable electronic calculator of pocket-size dimensions." We agree with TI that a mere change in size due to improved miniaturization by technological advance does not in itself save the accused device from infringement, and that the Commission erred to the extent that it construed the claims as limited to the 1967 state of the art of integrated semiconductor circuitry. Were the electronic means of clause b the only change, the record may not contain substantial evidence in support of the ALJ's finding of non-infringement. But viewing all of the modifications in the accused devices, we conclude that they reflect more than mere substitution of "an embellishment made possible by [improved] technology", as discussed in *Hughes Aircraft*, 717 F.2d at 1365, 219 USPQ at 483 (citing *Bendix*, 600 F.2d at 1382, 204 USPQ at 631); *Decca Ltd.*, 544 F.2d at 1080–81, 191 USPQ at 447–48; and *Eastern*

Rotorcraft Corp. v. *United States*, 397 F.2d 978, 981, 154 USPQ 43, 45 (Trial Div., Ct. Cl. 1967), *aff'd*, 158 USPQ 294 (Ct. Cl. 1968).

To summarize the totality of changes: The input means in the '921 patent is a keyboard encoder that operates through conductive strips under the keys, whereas in the accused devices it is a scanning matrix encoder. The electronic means in the '921 patent is an integrated semiconductor array based on bipolar semiconductor technology; the accused devices use metal oxide semiconductors and embody significant advances in chip design and integrated circuitry. The display means in the '921 patent is a thermal printer, whereas the accused calculators use liquid crystal displays. Taken together, these accumulated differences distinguish the accused calculators from that contemplated in the '921 patent and transcend a fair range of equivalents of the '921 invention. Each individual difference, standing alone, could conceivably lead to a different result, by application of this court's precedent. It is to the invention as a whole to which this same precedent directs our analysis.

The ALJ found that the technological breakthrough that made the miniature electronic calculator possible was the invention of the integrated circuit in 1958. Inventor Merryman had testified that "[s]imply making the determination that parts need to be small and interacted to fit in a pocket-sized housing does not take other than ordinary skill", but that it was the "[c]hoosing, developing and interacting, and all of those had to be done. None of those components were ready." Inventor Kilby similarly testified that "a number of new technologies [were] required" to achieve the size, cost and power objectives of the project which culminated in the '921 invention.

Equivalence of the subsequently-developed devices is not established by showing only accomplishment of the same result. "[A]bstractions cannot be patented." *Sealed Air Corp.* v. *U.S. International Trade Commission*, 645 F.2d 976, 985, 209 USPQ 469, 477 (CCPA 1981). As stated in *Westinghouse* v. *Boyden Power Brake Co.*, 170 U.S. 537, 569 (1898),

> even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result.

We conclude that the total of the technological changes beyond what the inventors disclosed transcends the equitable limits illustrated, for example, in *Graver Tank*, *D.M.I.*, *Hughes Aircraft*, and *Atlas Powder*, and propels the accused devices beyond a just scope of the '921 claims. The record before us contains substantial evidence to support the ALJ's conclusion that TI did not sustain its burden of proving infringement by the accused calculators under 35 U.S.C. § 112 paragraph 6.

B

TI presented the alternative argument that if the claims are not deemed literally infringed in terms of 35 U.S.C. § 112 paragraph 6,

they should be held infringed in terms of the doctrine of equivalents.

When literal infringement under section 112 paragraph 6 is not present the doctrine of equivalents may nevertheless apply, and thereby secure to the patentee the fair scope of the patent. *See Graver Tank*, 339 U.S. at 607–08; *Hughes Aircraft*, 717 F.2d at 1361, 219 USPQ at 480. In this case, however, where claimed functions are all performed in the accused devices, the considerations discussed in part *A* also apply to an infringement determination in terms of the doctrine of equivalents.

Whether the issue is equivalency of a means that is described in the specification to perform a function in a "means" clause of a combination claim (*i.e.*, literal infringement), or equivalency to the claimed invention as a whole (*i.e.*, infringement by the *doctrine* of equivalents), the test is the same three-part test of history: does the asserted equivalent perform substantially the same function in substantially the same way to accomplish substantially the same result. (In the case of "means" clauses, of course, the function is that stated in the claim.) This test has been described in various ways, *see, e.g., Deller's Walker on Patents*, § 546–558 (2d ed. 1972).

In the case of literal infringement of a claim containing a "means" clause in terms of section 112 paragraph 6, the accused structure, composition, or process is compared with that described in the specification for performing the claimed function. In the case of infringement under the doctrine of equivalents, the accused structure, composition, or process is compared with the claimed invention as a whole.

The interplay between the doctrine of equivalents and the permissible scope of the claims may be limited by the prosecution history. *Builders Concrete, Inc.* v. *Bremerton Concrete Products Co.*, 757 F.2d 255, 258, 225 USPQ 240, 242 (Fed. Cir. 1985); *Caterpillar Tractor Co.*, 714 F.2d at 1115–16, 219 USPQ at 187–88; *see also Hughes Aircraft*, 717 F.2d at 1362–63, 219 USPQ at 481–82. There is nothing in the prosecution history to constrain the breadth of claim interpretation which TI proposes. TI is correct in its asserting that neither the prior art nor the prosecution history mandates exclu sion of the accuse devices from the reach of the claims.

While the prior art and prosecution history are necessary considerations in applying the doctrine of equivalents, they do not of themselves control the breadth of equivalents available under the doctrine. *See Hughes Aircraft*, 717 F.2d at 1363, 219 USPQ at 482. In this case, the determination turns on the totality of change in the accused devices from that described in the '921 specification. For the reasons discussed in part *A*, the extensive technological advances in all of the claimed functions support the ALJ's finding that the accused devices are not equivalent to the claimed invention, applying the criteria of *Graver Tank*.

The determination of equivalency by its nature is inimical to the basic precept of patent law that the claims are the measure of the grant. *Aro Manufacturing Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 336, 339 (1961). The doctrine of equivalents, ubiquitous since its origin in *Winans* v. *Denmead*, 56 U.S. (15 How.) 330 (1853), exists solely for the equitable purpose of "prevent[ing] an infringer from stealing the benefit of an invention." *Graver Tank*, 339 U.S. at 608. To achieve this purpose, equivalency is judicially determined by reviewing the content of the patent, the prior art, and the accused device, and essentially redefining the scope of the claims. This constitutes a deviation from the need of the public to know the precise legal limits of patent protection without recourse to judicial ruling. For the occasional pioneering invention, devoid of significant prior art—as in the case before us—whose boundaries probe the policy behind the law, there are no immutable rules. We caution that the incentive to innovation that flows from "inventing around" an adversely held patent must be preserved. To the extent that the doctrine of equivalents represents an exception to the requirement that the claims define the metes and bound of the patent protection, we hearken to the wisdom of the Court in *Graver Tank*, that the purpose of the rule is "to temper unsparing logic" and thus to serve the greater interest of justice.

The decision of the Commission that the claims are not infringed is

AFFIRMED

(Appeal No. 86–1126)

YURI FASHIONS CO., LTD., APPELLANT *v.* UNITED STATES, APPELLEE

Andrew P. Vance, Barnes, Richardson & Colburn, of New York, New York, argued for appellant. With him on the brief was *Michael A. Johnson*.

Velta A. Melnbrencis, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With her on the brief were *Richard K. Willard*, Assistant Attorney General and *David M. Cohen*, Director.

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

(Appeal No. 86–1126)

YURI FASHIONS CO., LTD., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided November 18, 1986)

Before SMITH, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*.

NEWMAN, *Circuit Judge.*

Yuri Fashions Co., Ltd., appeals the judgment of the United States Court of International Trade, Judge DiCarlo presiding, holding that appellant's merchandise was properly excluded from entry. *Yuri Fashions Co.* v. *United States,* 632 F. Supp. 41 (Ct. Int'l Trade 1986). The judgment is affirmed on the basis of Judge DiCarlo's opinion.

AFFIRMED

*U.S. GOVERNMENT PRINTING OFFICE: 1986-181-118:40015

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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U.S. Customs Service

Treasury Decision

19 CFR Part 24

(T.D. 86–205)

CUSTOMS REGULATIONS AMENDMENTS REGARDING AD VALOREM USER FEE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim Regulations.

SUMMARY: This document amends the Customs Regulations to implement a provision of the Omnibus Budget Reconciliation Act of 1986 which authorizes the Customs Service to assess a merchandise processing user fee on formal entries of imported merchandise. This ad valorem user fee, which is to be based on the appraised Customs value of the merchandise, does not apply to articles provided for in schedule 8 of the tariff schedules or to products of least developed developing countries, eligible countries under the Caribbean Basin Economic Recovery Act, or U.S. insular possessions. The proceeds of the user fees are to be deposited in a dedicated account of the Treasury and, subject to authorization and appropriation, are to be used to offset Customs appropriations for the salaries and expenses of Customs incurred in conducting commercial operations. The amendments are being made on an interim basis due to the limited period of time available to initiate these changes before the law becomes effective. However, any written comments received will be considered before a final rule is issued.

DATES: Interim regulations effective on December 1, 1986. Written comments must be received by January 30, 1987.

ADDRESS: Written comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations Control Branch, Customs Services Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Thomas Banner, Commercial Compliance Division (202–566–4136). Legal Aspects: Arthur I. Rettinger, Office of the Chief Counsel (202–566–2486).

SUPPLEMENTARY INFORMATION:

BACKGROUND

USER FEES—HISTORY

Until recently, Customs had no general authority to collect fees for the processing of persons, aircraft, vehicles, vessels and merchandise arriving in or departing from the U.S. However, it has had authority under certain circumstances to charge fees, i.e., fees charged when providing preclearance of passengers and private aircraft when such services are of special benefit to particular persons. Customs also had been authorized to receive reimbursement from carriers for overtime services provided during non-business hours, and reimbursement from local authorities for services provided to certain small airports. Customs also has authority to assess fees on operators of bonded warehouses and foreign trade-zones and on the entry of vessels into ports. Further, Customs has authority to collect certain navigation fees specified in § 4.98, Customs Regulations (19 CFR 4.98).

The Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272) greatly extended Customs authority to assess fees. Section 13031 of Pub. L. 99–272 established a schedule of fees chargeable to users of various services provided by Customs in connection with the processing of persons, aircraft, vehicles, vessels and dutiable mail arriving in the U.S., as well as for the payment of an annual fee by customs brokers.

By T.D. 86–109, published in the Federal Register (51 FR 21152) on June 11, 1986, various parts of the Customs Regulations (19 CFR Chapter I), were amended on an interim basis to set forth the fees established by Pub. L. 99–272. The amendments were made on an interim basis due to the limited period of time available before the new law became effective. However, written comments were invited for consideration before final regulations are drafted. The numerous comments received have been analysed. However, by § 1893 of the Tax Reform Act of 1986 (Pub. L. 99–514), passed on October 22, 1986, several technical amendments were made to Pub. L. 99–272, and the effect of these legislative changes necessitates several changes to the interim regulations. The final regulations implementing these fees will appear as a separate document in the Federal Register. The document will describe the changes made as a result of the technical amendments and the comments.

Other amendments were made to Pub. L. 99–272 by the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509). Among these amendments is the establishment of an ad valorem user fee to be collected by Customs on formal entries of merchandise imported for consumption, or withdrawn from warehouse for consumption, beginning on December 1, 1986. This document sets forth interim regulations governing the ad valorem user fee.

AD VALOREM FEE

Section 8101 of Pub. L. 99–509 states that with certain exceptions, merchandise formally entered, or withdrawn from a warehouse, for consumption, is subject to an ad valorem fee based on the appraised customs value of the merchandise. The fee does not apply to informal entries of merchandise entered under the procedures set forth in § 143.21, Customs Regulations (19 CFR 143.21), and to merchandise which does not enter the commerce of the U.S. for consumption. The proceeds of the user fees are to be deposited in a dedicated account of the Treasury and, subject to authorization and appropriation, are to be used to offset Customs appropriations for the salaries and expenses of Customs incurred in conducting commercial operations.

Pursuant to § 8101, the fee that will be assessed is 0.22 percent ad valorem for merchandise formally entered, or withdrawn from a warehouse, for consumption, after November 30, 1986, and before October 1, 1987. After September 30, 1987, the fee will be 0.17 percent ad valorem or a lesser ad valorem rate determined by the Secretary of the Treasury as sufficient to provide the amount of revenue needed to conduct commercial operations for the upcoming fiscal year. The Secretary of the Treasury shall publish in the Federal Register the ad valorem rate for fiscal year 1988 by no later than the date that is 5 days after which funds are appropriated to Customs for salaries or expenses incurred in conducting commercial operations. The rate set shall apply for the processing of entries and withdrawals from warehouse for consumption made after the date that is 60 days after the date of such determination.

A slightly higher fee is assessed for the first 10 months of the ad valorem fee to ensure that there are adequate receipts to cover start-up costs and to cover any potential increases in the costs of Customs commercial operations. Unless reauthorized by Congress, fees are not to be charged after September 30, 1989.

ARTICLES NOT SUBJECT TO FEE

Pub. L. 99–509 provides that certain articles are to be exempt from the ad valorem fee. The exemptions are: (1) articles provided for in schedule 8 of the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202); (2) products of insular possessions of the U.S.; and (3) products of any country listed in General Headnote 3(e)(vi) or (vii), TSUS. General Headnote 3(e)(vi) lists least developed developing countries. General Headnote 3(e)(vii) lists beneficiary countries of the Caribbean Basin Economic Recovery Act (CBERA) (19 U.S.C. 2701 *et seq.*). The fee applies to all other articles, even if duty-free or eligible for tariff preference.

OTHER SPECIFICS OF FEE

The ad valorem fee is to be paid by the importer of record of the merchandise and shall be based on the value of the merchandise as determined under § 402, Tariff Act of 1930, (19 U.S.C. 1401a).

Charges imposed by the ad valorem user fee are considered to be charges or exactions within the meaning of § 514, Tariff Act of 1930, as amended (19 U.S.C. 1514). As such, they are final and conclusive upon all persons unless a protest is filed in accordance with the procedures set forth in Part 174, Customs Regulations (19 CFR Part 174).

COMMENTS

Customs realizes that this document does not answer all questions pertaining to collection of the ad valorem user fee. Because of the limited time available to draft these regulations before the statutory effective date, the regulations basically follow the statutory language of Pub. L. 99–509. Additional regulations and directives will be prepared and disseminated as soon as possible. Comments are requested on the conforming or clarifying regulatory changes needed as a result of the statute or these interim regulations.

Before adopting the interim regulations as a final rule, Customs will give consideration to any written comments (preferably in triplicate) timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

The statutory effective date for collection of the ad valorem user fee is December 1, 1986. In light of the limited deadline imposed upon Customs to implement these changes, it has been determined that, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure is impracticable. For the same reason, pursuant to 5 U.S.C. 553(d)(3), we are dispensing with a delayed effective date. However, before adopting final regulations, consideration will be given to all written comments timely submitted.

E.O. 12291 AND REGULATORY FLEXIBILITY ACT

Because the amendments do not meet the criteria for a "major rule" within the meaning of § 1(b) of E.O. 12291, Customs has not prepared a regulatory impact analysis.

Because no notice of proposed rulemaking is required for these interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Paperwork Reduction Act

No new recordkeeping or data collection burdens are imposed upon the public as a result of this amendment. Accordingly, it is not subject to the Paperwork Reduction Act of 1980, Pub. L. 96–511.

List of Subjects in 19 CFR Part 24

Accounting, Taxes.

Drafting Information

The principal author of this document was Harold M. Singer, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

Amendments to the Regulations

Part 24, Customs Regulations (19 CFR Part 24), is amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority for Part 24, Customs Regulations, is amended to read as follows:

Authority: 19 U.S.C. 66, 1202, 1624; 31 U.S.C. 9701; Pub. L. 99–272, Pub. L. 99–509.

2. Part 24 is amended by adding a new § 24.23 to read as follows:

§ 24.23 Ad valorem fee.

(a) *Fee.* Except for those types listed in paragraph (b), merchandise formally entered or withdrawn from a warehouse, for consumption, is subject to the payment to Customs of an ad valorem fee of 0.22 percent from December 1, 1986, through September 30, 1987. For the fiscal year beginning October 1, 1987, the fee will be the lesser of 0.17 percent ad valorem or an ad valorem rate provided by the Secretary of the Treasury pursuant to § 8101(a) of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509). The fee for the fiscal year beginning on October 1, 1987, will be published in the Federal Register. The fee shall be based on the value of the merchandise as determined under § 402, Tariff Act of 1930 (19 U.S.C. 1401a).

(b) *Exemptions.* The following articles are not subject to the ad valorem fee:

(1) Articles provided for in schedule 8, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202).

(2) Products of insular possessions of the U.S. (General Headnote 3(a), TSUS).

(3) Products of beneficiary countries of the Caribbean Basin Economic Recovery Act. (General Headnote 3(e)(vii), TSUS).

(4) Products of least developed developing countries. (General Headnote 3(e)(vi), TSUS).

(c) *Payment.* The fee shall be due and payable to Customs by the importer of record of the merchandise at the time of deposit of estimated duties.

MICHAEL SCHMITZ,
Acting Commissioner of Customs.

Approved: November 15, 1986.

MICHAEL H. LANE,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 1, 1986 (51 FR 43188)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 24, 1986.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 86–24)

This ruling holds that "articles of domestic manufacture or production" under 19 U.S.C. 1309(b) are not eligible for drawback pursuant to the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3).

January 3, 1986
Refer to DRA–1–09–CO:R:CD:D
218493 RB

Issue: Are "articles of domestic manufacture or production" under 19 U.S.C. 1309(b) eligible for drawback pursuant to the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3)?

Facts: Jet fuel produced in the United States is laden as fuel supplies on foreign aircraft operating in international traffic. Drawback is sought to be claimed on this jet fuel under the substitution provision of the same condition drawback law, section 1313(j)(3), imported, duty-paid jet fuel fungible therewith forming the basis for the claim.

In addition to fungibility, it is presumed that any other statutory and regulatory requirements applicable to substitution same condition drawback not in issue herein would also be satisfied.

Law and Analysis: 19 U.S.C. 1309(b) provides in pertinent part that "articles of domestic manufacture or production" laden as supplies upon foreign vessels or aircraft may, under certain conditions, be considered exported for drawback purposes. Section 1309(b) in ef-

fect furnishes a statutory means of fulfilling the requirement of exportation in the context of the drawback law. Without this provision, the mere act of lading products of domestic manufacture as supplies on a foreign vessel or aircraft would not otherwise constitute an exportation (see *Swan and Finch Co.* v. *United States*, 190 U.S. 143, 145; 17 Op. Atty. Gen. 579, 583; 19 CFR 101.1(k)).

As originally included in section 1309(b), enacted as section 309(b) of the Tariff Act of 1930 on June 17, 1930, it is clear that the expression "articles of domestic manufacture or production" exclusively means articles which are manufactured or produced in accordance with the manufacturing drawback law, as amended, 19 U.S.C. 1313(a) and (b), and applicable regulations, and which are thus intended to qualify for drawback on this basis, sections 1313(a) and (b) being the only provisions to which section 1309(b) could have referred at the time of its original enactment (see H. Rept. 7, 71st Cong., 161–162 (1929)).

19 U.S.C. 1313(j)(3), the substitution same condition drawback law, enacted as section 202 of Public Law 98–573, the Tariff and Trade Act of 1984, and effective on November 14, 1984, provides in pertinent part that imported, duty-paid articles may, under certain conditions, form the basis of a claim for drawback on other imported or domestic articles fungible therewith, when the latter are exported.

It is apparently desired that section 1309(b) be read *in pari materia* with section 1313(j)(3), and, as a result, that "articles of domestic manufacture or production" in section 1309(b) be considered exported for purposes of section 1313(j)(3).

The doctrine of *in pari materia*, however, is resorted to only in cases where the meaning of a statute is ambiguous or doubtful (*Northern Pac. Ry. Co.* v. *United States*, 156 F.2d, 346, 350 (7th Cir. 1946), aff'd 330 U.S. 248). Because the meaning intended by "articles of domestic manufacture or production" in section 1309(b) is clear, as noted above, the application of this rule of statutory construction in the present case would be unwarranted and incorrect. Inasmuch as section 1309(b) is not specifically amended by section 1313(j)(3), "articles of domestic manufacture or production" as used therein should therefore properly retain the meaning intended at the time of its original enactment (see *Manry* v. *Robison*, 56 S.W.2d 438, 447 (Tex. 1932); also note *Gemsco* v. *Walling*, 324 U.S. 244, 265).

Furthermore, Customs has previously held, correctly, that imported, duty-paid articles may not themselves be considered exported under section 1309(b) and directly claimed for same condition drawback under 19 U.S.C. 1313(j)(1) (section 201 of Public Law 96–609, effective on December 28, 1980), same condition drawback not being provided for in connection with section 1309(b) (Headquarters letter dated November 28, 1983, file CON–13–01, DRA–1–CO:R:E:E 722625; and cf. *Atlas Marine Supply Co.* v. *United States*, C.D. 549). Hence, to permit such articles to form the basis for

same condition drawback on other (substituted) articles, when, in identical circumstances, they could not qualify for same condition drawback themselves, would be contradictory and anomalous. "And we should discard any construction that would lead to absurd consequences" (*Oates* v. *National Bank*, 100 U.S. 239, 244).

Accordingly, "articles of domestic manufacture or production" as set forth in section 1309(b) cannot be considered exported thereunder for purposes of substitution same condition drawback, section 1313(j)(3).

Holding: "Articles of domestic manufacture or production" under 19 U.S.C. 1309(b) are not eligible for drawback pursuant to the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3).

(C.S.D. 86–25)

This ruling holds, under 19 CFR 191.141, that failure to file a notice of intent to export before merchandise is exported, or to secure a waiver of that filing requirement, will invalidate a claim for same condition drawback under 19 U.S.C. 1313(j).

January 10, 1986
Refer to DRA–1–CO:R:CD:D
218395 R

Issue: Whether the failure to file a notice of intent to export, or get a waiver of that filing requirement, before merchandise is exported is fatal to a same condition drawback claim?

Facts: Six protests are involved. The protests are against denials of drawback which are based on failures to file a notice of intent to export, or to get waivers of that filing requirement, under 19 CFR 191.141. The regulatory requirement was published as T.D. 83–212 and was to take effect on December 12, 1983. Assuming that the documentary evidence in each of the six protests is sufficient to prove the exportation of the merchandise involved, there is no evidence that shows that any of the merchandise was exported before that date. This decision is limited to the consideration of the effect of 19 CFR 191.141 on drawback eligibility alone. There is no evidence that Customs waived the requirement before exportation.

Law and Analysis: The filing requirement of 19 CFR 191.141 was the subject of considerable controversy. In T.D. 83–212 (48 F.R. 46753, Oct. 14, 1983, 17 Cust. Bull. 465), at 17 Cust. Bull. 498–499, the purpose of the provision was stated. The Customs Service disagreed with the assertions that there was no authority to require prior notice and that prior examinations of merchandise were unnecessary.

A similar pre-export filing requirement was considered by the appellate court in *U.S.* v. *Lockheed Petroleum Services*, 1 Ct. Appls. Fed. Cir. 63, 709 F. 2d. 1472 (1983). That case concerned 19 CFR

22.4(g) (1982) which required a drawback claimant to file an abstract of manufacture before the vessel, on which drawback was to be based, left the U.S. At page 65 the court stated that drawback eligibility depended on the claimant's compliance with that requirement because the failure to comply deprived the Government of the ability to verify the contents of the abstract. The same reasons apply here. The failure to file the required notice of intent to export deprived the Government of the ability to verify the identity of the merchandise with that of the imported merchandise, and the condition of the merchandise that is to be exported.

In protest 3801–000414 the protestant asserts that an examination by a Customs officer on the date of exportation pursuant to the protestant's request to register foreign merchandise is compliance with 19 CFR 191.141. Examination on the date of exportation is not notification five working days before exportation. In the case of *Spencer, Kellogg and Sons, Inc.*, v. *U.S.*, 13 Ct. Cust. Appls. 612, T.D. 41459 (1926), the court held that an oral notice, on February 20, to a Government inspector who was doing other work, that the drawback claimant expected to load merchandise for drawback at 8:00 a.m. on February 23 did not satisfy the regulatory requirement that written notice be filed with the collector at least 6 hours before lading of the merchandise and a copy of that notice be given to the Customs inspector at the place of lading. The merchandise was laded during the period from 3 p.m., February 22 to 6:30 a.m., February 23. The court held that the regulation requiring the notice of intent to export was mandatory, and could not be disregarded in favor of proving exportation by some other means. To similar effect is the court's decision in the case of *Nestle's Food Co.*, v. *U.S.*, 16 Ct. Cust. Appls. 451, T.D. 43199 (1929). There the claimant orally notified a Customs inspector at one pier of the export cargo's diversion to another pier when the regulations required written notice to the collector or to the inspector at the place of the actual lading in ample time to secure examination. The court found that as neither the collector or the inspector at the place of lading was told of the diversion, the merchandise was laded without Customs supervision. The court rejected the argument that the oral notification constituted substantial compliance with the regulation. The court in *Swift and Co.*, v. *U.S.*, 10 Cust. Ct. 198, C.D. 753 (1943), reh. den. 11 Cust. Ct. 321, abs. 49029 (1943), held that the failure to notify Customs of a diversion, when required to do so by regulation, was not compliance. It held that no compliance short of actual compliance could be regarded as sufficient compliance. The case of *Swan Tricot Mills Corp.* v. *U.S.*, 63 Cust. Ct. 530, C.D. 3948 (1969) involves the application of a concept similar to the one advanced by the protestant here. In that case the drawback claimant asserted that a Customs inspector's examination to certify the exportation of bobbins temporarily entered under bond substantially complied with the regulatory requirements relative to rejected merchandise drawback as to

the rejected yarn that was on the bobbins. The court rejected that argument. At page 534 of its opinion the court stated why an examination for a purpose other than drawback does not constitute substantial compliance with a regulatory procedure designed for drawback verification:

> For one thing, the yarn here involved was never returned to Customs custody for a drawback examination to determine whether or not it conformed to sample or specifications. In this connection it is important to observe that the Customs examination for drawback purposes is quite different from the examination to satisfy a temporary importation bond. In the examination for drawback purposes, it is essential to determine whether or not the merchandise conformed to sample or specifications. By contrast, in the examination to satisfy a temporary importation bond, it is only necessary to determine what merchandise was laden aboard the vessel for export; hence, there is no need to determine whether the merchandise conformed to sample or specifications. This is illustrated by what occurred in the present case where the Customs inspector who inspected the merchandise to ascertain whether the temporary importation bond was satisfied made no effort to determine whether or not such merchandise conformed to sample or specifications. Nor was he supposed to, since this task was to determine what merchandise was exported.

That reasoning is equally applicable here with respect to the assertion that the certification on the registration form substantially complies with the regulatory requirement of 19 CFR 191.141.

The submission of waybills, particularly waybills which describe the cargo as packages "said to contain" certain merchandise, does not satisfy the requirement of 19 CFR 191.141.

In protest 3801–5–000826, the protestant asserted that the merchandise was examined by Customs prior to export and submitted copies of Canadian Customs and Excise forms in support of that assertion. Canada is not part of the United States. Examination of merchandise by Customs officers of another country in that country must occur after that merchandise leaves the United States. In any event, the United States Customs Service has not delegated same condition drawback examination authority to Canadian Customs officers. Such an examination by Canadian officials, even if it occurred, does not comply with the required procedure in 19 CFR 191.141.

Holding: The failure to file a notice of intent to export, as required by regulation, or to get a waiver of that regulatory requirement, before the merchandise is exported as a basis on which to deny drawback.

(C.S.D. 86–26)

This ruling holds that exportations and/or substitutions made prior to the effective date (November 14, 1984) of Section 202 of Public Law 98–573 (19 U.S.C. 1313(j)(3)) are not eligible for substitution same condition drawback.

January 14, 1986
Refer to DRA–1–CO:R:CD:D
218449 K

Issue: The issue is whether substituted merchandise that was exported prior to the effective date of the substitution same condition drawback law is eligible for drawback.

Facts: For purposes of this decision, it is assumed that all requirements of law (19 U.S.C. 1313(j)(3)) and the Customs Regulations (19 C.F.R. 191.141(h)) are met except that the substituted merchandise was exported prior to the effective date of the substitution same condition drawback law.

Law and Analysis: Section 202 of Public Law 98–573, dated October 30, 1984, amended the same condition (direct identification) drawback law, 19 U.S.C. 1313(j). Generally, the amendment allows same condition substitution drawback within a 3 year time limitation upon the exportation or destruction of merchandise (whether imported or domestic) that is substituted for imported duty-paid merchandise provided that the substituted merchandise is fungible with such imported duty-paid merchandise, that it is in the possession of the party claiming drawback, that it was not used in the United States before exportation or destruction, and that it is in the same condition at the time of exportation or destruction as was the imported duty-paid merchandise at the time of its importation.

In Customs Service Decision (C.S.D.) 85–34, dated February 5, 1985, we noted that under Section 214 of Public Law 98–573, the amendment (Section 202) became effective on November 14, 1984, the 15th day after enactment. However, in C.S.D. 85–34, we ruled, in part, that imported duty-paid merchandise imported before the effective date (November 14, 1984) may be designated for drawback, provided of course, that all other requirements of law including time limitations are met. The ruling cited and followed the decision of the Customs Court in *General Motors Corporation* v. *United States*, 32 Cust. Ct. 94, C.D. 1587 (1954).

The Court decision is cited to support a position that C.S.D. 85–34 should be expanded to include exportations of merchandise that were made prior to the effective date for the substitution same condition drawback law. We do not agree. In its decision, the Court went on to address this question and clearly answered in the negative.

The *General Motors Corporation* decision concerned Public Law 109, effective August 8, 1951, which extended the privilege to sub-

stitute certain merchandise for imported duty-paid merchandise used in the manufacture or production of articles within certain time limitations and exported for drawback. Although Section 202 of Public Law 98–573 concerns substitution same condition drawback rather than substitution manufacturing drawback under Public Law 109, the issues concerning designation of merchandise and the exportation of merchandise prior to the effective dates are identical. We agree with the decision of the Court in *General Motors Corporation* in holding that merchandise imported prior to the effective date of August 8, 1951, may be designated for drawback. In this regard, the Court stated at page 96 that "A mere reading of the statutory provision shows this to be so."

However, the Court went on to state in *General Motors Corporation* at page 96 that "Quite obviously, the statute could be effective only as to exportations made on or after August 8, 1951 * * *." Further, the Court continued and ruled out retroactive substitution when it stated at page 98 "Clearly, there was no accruing right, prior to August 8, 1951, as to the imported steel herein to have substituted for it, with benefit of drawback, domestic merchandise of the same class or kind." The Court, as we did in C.S.D. 85–34, extended retroactive status only to the designation of imported duty-paid merchandise as the basis for drawback (refund of duty) and did not extend retroactive status to exportations or substitutions. In the absence of a legislative mandate, we have no authority to do so.

Holding: Exportations and/or substitutions made prior to the effective date (November 14, 1984) of Section 202, Public Law 98–573 (19 U.S.C. 1313(j)(3)) are not eligible for substitution same condition drawback.

Effect on Other Rulings: This ruling supplements C.S.D. 85–34.

(C.S.D. 86–27)

This ruling holds that statements placed on orange juice packages relative to the origin of imported concentrate which are not categorical or lack specificity as to the proper country of origin do not meet the criterion set forth in C.S.D. 85–47 and C.S.D. 86–19 governing the proper country of origin marking in such instances (19 U.S.C. 1304 and 19 CFR 134.46).

May 1, 1986
MAR–3 CO:R:E:E
729523 LR

LAUREN R. HOWARD, Esq.,
Collier, Shannon, Rill & Scott, 1055 Thomas Jefferson Street, NW., Washington, D.C. 20007.

DEAR MS. HOWARD: This is in response to your letter dated April 2, 1986, on behalf of the National Juice Products Association, which

raises an issue relating to compliance with C.S.D. 85–47. Specifically, you ask the Customs Service to authorize processors to mark their retail products to indicate that they "*may* contain concentrate from Florida and/or Brazil" as opposed to stating more categorically that the product "contains a blend of Florida and Brazilian concentrate". You request that this variation be permitted *in addition to* the above categorical statement which we have already approved. *See* Ruling No. 729410, March 19, 1986. Alternatively, you ask that Customs permit the statement: "contains Florida concentrate and may contain concentrate imported from Brazil".

In your opinion the approved statement "contains a blend of Florida and Brazilian concentrate" might pose a problem if a processor had only Florida concentrate available to it for an extended (although finite) period of time; the processor might be charged with misbranding under the Food, Drug & Cosmetic Act if it used this existing packaging, which on its face suggests the presence of both Florida and Brazilian concentrates. You indicate that the only apparent alternatives for the processor would be to ensure that at least a miniscule amount of Brazilian concentrate were added to each retail product or to maintain duplicate labeling inventories.

Although the purpose of our March 19, 1986, ruling permitting alternative markings was to facilitate compliance with C.S.D. 85–47, it was *not* our purpose to ensure that in every case juice processors would be able to utilize one standardized label. In some instances, such as the situation you raise, this simply may not be possible. In considering alternative marking proposals, Customs must weigh the extent of the deviation from the statutory requirements, the degree of accuracy that is sacrificed as a result of the deviation, and the extent to which the deviation will facilitate compliance with the marking statute. For example, Customs approved the "major supplier rule" (allowing processors to list only their major suppliers of foreign manufacturing concentrate) because such method of marking has the overwhelming advantage of eliminating the need for the processors to have numerous labels on hand to be used when there are slight changes in their sources of supply. Customs recognized that such an advantage outweighed the certain degree of accuracy that would necessarily have to be sacrificed by listing only the processor's major sources of supply. In addition, the marking of the major foreign sources of the imported product did not, in our opinion, deviate too far from the statutory requirement of informing the ultimate purchaser of the country of origin.

In our opinion, the "may contain" language you suggest is too far a deviation from the statutory requirement of section 304 of the Tariff Act of 1930, as amended, to inform the ultimate purchaser of the country of origin. While the "may contain" statement is technically more accurate than the categorical statement, it does not actually inform the ultimate purchaser of the country of origin; it merely indicates the *possibility* that a product may be of foreign origin.

We believe that approval of the "may contain" language would render the country-of-origin marking nugatory. If processors are concerned that they might be subject to penalties for misbranding if they used a standardized label indicating the presence of foreign concentrate for retail orange juice products which might in fact contain only domestic-origin concentrate, then they should maintain duplicate labels. Those processors that are ever in a position to use solely domestic concentrate will probably do this anyway.

Finally, we would like to clarify a misunderstanding regarding our approval of the marking "contains a blend of Florida and Brazilian concentrate". In our March 19 ruling we stated that we have no objection to showing that the orange juice is a blend of domestic and imported concentrate, if that in fact is the case. You indicate that this formulation would appear available to processors using *any* amount of domestic concentrate, just as the marking requirement is, in accordance with C.S.D. 85–47, applicable to retail orange juice products containing *any* amount of imported manufacturing concentrate. We would agree with your conclusion only in situations where the processor chooses to list *all* foreign sources of concentrate (and not just his major foreign sources). However, if a processor chooses to adopt the "major supplier" rule and lists only his major foreign sources, it is our position that the Florida content may be indicated only if Florida is similarly a major supplier of concentrate to that processor.

(C.S.D. 86–28)

This ruling holds that foreign produce which is imported into the United States in bulk raw form for purposes of further processing does not ultimately result in an article which has been substantially transformed into a new and different article for country of origin marking purposes. Domestically repackaged foreign produce must be marked to indicate the country of origin where the imported product was produced in accordance with 19 U.S.C. 1304 and 19 CFR 134.25.

June 25, 1986
Refer to MAR 2–05 CO:R:E:E
729365 LR

TO: District Director of Customs
Laredo, Texas

FROM: Director, Entry Procedures and Penalties Division

SUBJECT: Request for Internal Advice (Imported Broccoli)

This ruling concerns the country-of-origin marking requirements applicable to broccoli imported in bulk raw form and processed in the United States.

Issue: Whether pursuant to Section 304 of the Tariff Act of 1930, as amended, and section 134.25, Customs Regulations (19 CFR 134.25), domestically repackaged foreign broccoli must be marked to indicate the country of origin where the imported broccoli has been processed in the United States by cutting to proper length, quartering or spearing, blanching, packaging, and freezing; whether such processing "substantially transforms" the imported product into a product of the United States, thereby exempting the repackaged product from country-of-origin marking requirements.

Facts: The broccoli in question is imported from Mexico in bulk form. After importation, the broccoli is graded, inspected, trimmed to proper length (four or five inches), cut in quarters or spears, steam blanched for six minutes, cooled, frozen solid and packaged. The size of the package varies depending on whether the broccoli is intended for retail or institutional use. By customer order, broccoli spears can also be made into 1 inch broccoli cuts or quarter inch chopped broccoli.

Applicable Law: Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) provides in general that all articles of foreign origin imported into the United States, or their containers, shall be legibly and conspicuously marked to indicate the country of origin to an ultimate purchaser in the United States. Fresh vegetables and other natural products are exempt from individual marking, but the containers in which they reach the ultimate purchaser are required to be marked. 19 U.S.C. 1304(a)(3)(J) and 19 CFR 134.33. Pursuant to 19 CFR 134.25, various products which are exempt from individual marking when imported in bulk quantities (including vegetables) are required to be marked with the country of origin on the package when they are repackaged in the United States in retail containers.

The critical question in this case is whether the broccoli has been subjected to a substantial processing operation which has resulted in the creation of a new and different article of commerce with a new name, character, or use. If the broccoli has been so substantially transformed, then it must be treated as a product of the United States. The processing plant would be considered the "ultimate purchaser" of the imported product, within the meaning of 19 U.S.C. 1304(a) and the requirements of 19 CFR 135.25 are not applicable.

It is a well-settled principle of customs law that in order for a substantial transformation to be found, an article having a new name, character, and use must emerge from the processing. *United States* v. *Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267, C.A.D. 98 (1940). The issue before the Customs Court in that case was whether hairbrushes and toothbrushes manufactured in the United States by inserting bristles into wooden handles imported from Japan were required to be marked as products of Japan. After careful examination of the statute and its legislative history, the Customs Court concluded that Congress had not intended the marking requirement

to continue to apply to an imported article which is used in the United States as a material in the manufacture of a new article having a new name, character, and use, and which consequently loses its separate identity in the finished product.

This decision was followed and quoted extensively in *Grafton Schools, Ltd.* v. *United States,* 45 Cust. Ct. 16, 23, C.D. 2190 (1960), in which empty metal spools imported from England and wrapped in the United States with inked ribbons to create typewriter ribbons and business machine ribbons were found to have lost their identity in the finished product. The court observed that what the ribbon manufacturers were selling were ribbons, which of course had to be wound on a spool, but it was the ribbon and not the spool which the manufacturer's customers were interested in purchasing.

One of the most significant recent court decisions on the issue of country of origin marking is *Uniroyal Inc.* v. *United States,* 3 C.I.T. 220, 542 F. Supp. 1026 (1982), *aff'd,* 702 F.2d 1022 (Fed Cir. 1983). In this case the merchandise before the Court of International Trade consisted of "footwear uppers consisting of complete shoes except for an outsole * * *", manufactured in Indonesia, and imported into the United States where a pre-shaped rubber outsole was affixed and the completed shoe was sold to retailers. The question was whether the addition of the outsoles substantially transformed the uppers so that the finished shoe could be marketed in the United States without having to be marked as a product of Indonesia.

After carefully examining both the imported upper and the finished shoe, the Court of International Trade concluded that the imported upper did not lose its distinct identity in the finished shoe, and to the contrary was the very essence of the completed shoe. This was so even though the imported upper could not be sold to or worn by consumers without the heavy rubber outsole being attached, and even though following attachment of the rubber outsole the shoe was called by a different name, a deck shoe, rather than an upper or a moccasin.

In the most recent country of origin marking case involving the issue of substantial transformation, *National Juice Products Association* v. *United States,* Slip Op. 86–113, (January 20, 1986) the Court of International Trade upheld Customs' determination that imported orange juice concentrate is not substantially transformed when it is processed into retail orange juice products. The court stated "the retail product in this case is essentially the juice concentrate derived in substantial part from foreign grown, harvested, and processed oranges. The addition of water, orange essences, and oils to the concentrate, while making it suitable for retail sale does not change the fundamental character of the product, it is still essentially the product of the juice of oranges." *See also Uniroyal Inc.* v. *United States, supra.*

Arguments Presented: The importer maintains that the domestic processing substantially transforms the imported raw broccoli into

a new article of commerce with a different name, character and use. Specifically, it is claimed that:

> 1) the broccoli undergoes a physical change from its imported state in that the shelf life is greatly extended from a few days to over a year;
>
> 2) the market for fresh broccoli and the market for frozen broccoli are distinct and well-established;
>
> 3) the process is complex requiring a multi-million dollar investment in equipment and specialized buildings and trained personnel earning up to $11.00 an hour to operate it; over 300 employees are necessary for the process;
>
> 4) the machinery used for quick freezing and packaging the product use a high level of technology; and,
>
> 5) the domestic processing increases the cost of the broccoli from $.09 a pound (wholesale) to approximately $1.39 a pound (retail).

A detailed description of the processing steps, including the type of machinery used in each step and the number of employees necessary to operate them, has been submitted.

Analysis: A close examination of these processing operations is necessary to determine whether they substantially change the imported broccoli so that its fundamental character and identity are lost or subordinated in the finished product. If so, then a new and different article can be presumed to have been created.

The crucial operations performed on the imported bulk broccoli are trimming and cutting, and blanching and freezing. The trimming and cutting operations are fairly self-explanatory. As indicated above, after importation the imported bulk broccoli is trimmed to four or five inch lengths and then either chopped or cut into spears or quarters. The designation on the package is based on how the broccoli is cut. After cutting, the broccoli is blanched.

The blanching process prepares the broccoli for freezing. The process has been described as "subjecting vegetables either to hot water or steam to deactivate the enzymes before freezing. Unless deactivated the enzymes in fresh vegetables might, and probably would, result in loss of flavor and color during the period of frozen storage." *Border Brokerage Co., Inc.* v. *United States*, 284 F. Supp. 806, C.D. 3437 (1968) at p. 488. In *Green Giant Co.* v. *United States*, 495 F.2d 775, 61 C.C.P.A. 46 (1974), the blanching process was said to partially cook and retard any deterioration of the vegetable from within. In this case, the broccoli is steam blanched for six minutes at 210 degrees Farenheit.

After cooling and packaging, the broccoli is quick-frozen. Depending on the particular cut of the broccoli and whether it is intended for institutional or retail use, the freezing process takes from 30 minutes to 8 hours. As a result of the freezing process, the shelf life

of the broccoli is prolonged from 2–3 weeks to 6–8 months, provided frozen storage conditions are maintained.

After having reviewed the material submitted to Customs, we are of the opinion that as a result of the processing described—the cutting, blanching and freezing operations—the imported broccoli does not lose its fundamental character and identity and is not substantially transformed into a new article of commerce with a different name, character, and use.

The name of the imported article remains the same after processing, although it may have different modifiers preceding it. The imported product may be known as "fresh" broccoli whereas the processed products may be described as "frozen" broccoli or "chopped" broccoli. This does not change the fact that the fundamental identity of the imported product (as broccoli) is maintained, and not lost or subordinated in the processed product. Although some consumers may distinguish between the imported product and the processed product, that is, some consumers prefer fresh broccoli when it is available; and although fresh broccoli has some uses for which processed broccoli is less satisfactory, nonetheless it appears that broccoli processed in the manner described here is interchangeable with fresh broccoli for many purposes.

It is significant that the processes described here, far from transforming the character of the broccoli, are preservative in nature and are intended to *maintain* to the extent possible the characteristics of the imported product. Certainly, the imported product cannot be said to have been used in a manufacturing process in which its identity is lost or subordinated as would be the case if, for example, it were used in the manufacture of canned soup or frozen quiches.

Holding: In view of the absence of significant distinctions between the commercial consequences of processing in the *Uniroyal* and *National Juice Products Association* cases, and the consequences which result from the processing described in this case, it is our opinion that the imported broccoli is not substantially transformed into a new and different article, that it remains after processing a product of the country where the fresh product was produced, and that broccoli processed in this manner must be marked with the name of the country in which the fresh broccoli is produced.

Scope of Ruling: Although this ruling was requested to clarify applicability of the country of origin marking statute to imported broccoli which is processed for freezing in the United States, this ruling is equally applicable to other imported produce which is processed in a manner substantially similar to the processing described above. Parties who desire to have the Customs Service clarify applicability of this ruling to particular situations should contact the Director, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue N.W., Washington, D.C. 20229.

Effective Date: In compliance with the direction of the Court of International Trade in the *National Juice Products Association* case, Customs has made a special effort to obtain information for the purpose of establishing an effective date for this ruling. As part of on-site visits to food processing plants along the Mexican border in Texas, Customs officials obtained information on inventories of packaging materials and usual schedules for ordering new packaging materials. It appears that packaging is ordered to accommodate processing of the produce of a particular growing season. Both processors and Customs officials along the border agreed that the current growing season and importation of produce for processing ends during November. Therefore, this ruling will be effective as to produce imported on or after December 15, 1986.

(C.S.D. 86-29)

This ruling holds that the country of origin marking requirements set forth in 19 CFR 134.46 apply to tissue wrappers and tags which accompany an imported article if they contain a reference to a country or locality other than the country or locality in which the imported article was manufactured.

August 6, 1986
729737 LR

ALL DISTRICT DIRECTORS OF CUSTOMS

Re: Applicability of section 134.46, Customs Regulations, to tissue wrappers and/or tags accompanying imported footwear

Questions have arisen concerning the applicability of section 134.46, Customs Regulations, to tissue wrappers and tags which accompany imported shoes and shoe boxes when these items contain one or more references to a locality other than the country of origin.

Tissue Wrapper: An importer believes that tissue wrappers are not subject to the requirements of section 134.46, Customs Regulations because that section is applicably only to "an imported article or container."

For the purposes of section 134.46, we consider the tissue wrapper to be part of the footwear container. We believe the purpose of the regulation would be frustrated if a more narrow interpretation of the word container was adopted. Therefore, if the tissue wrapper contains a reference to a locality other than the country of origin (of the shoes), the tissue wrapper must be marked in accordance with the requirements of section 134.46. If the tissue wrapper contains no such reference, it need not be marked with the country of origin. Please apply this rule with respect to merchandise imported on or after October 1, 1986.

Tags: An importer also believes that tags which accompany imported footwear (*i.e.* those which contain information about the product and/or the company) are not subject to the requirements of section 134.46. We disagree. Customs has always considered such tags to be part of the imported article and if they contain a reference to a country or locality other than the country or locality in which the article was manufactured, such tags are subject to the requirements of section 134.46. Please continue to ensure that these tags conform to the requirements of section 134.46, with respect to all present and future entries.

Please use your best efforts to assure that importers of footwear in your district are aware of the above requirements.

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 85–2455 and 86–609)

JEANNETTE SHEET GLASS CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, CRYSTAL INTERNATIONAL CORP., ET AL., AND GLAVERBEL, S.A., DEFENDANTS-APPELLEES

James P. Cannon, Jr., Stewart and Stewart, of Washington, D.C., argued for appellant. With him on the brief were *Eugene L. Stewart, Terrance P. Stewart* and *Charles A. St. Charles.*

Catherine R. Field, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for ITC and Crystal. With her on the brief were *Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel. *N. David Palmeter, David P. Houlihan*, and *Alan H. Price*, Mudge Rose Guthrie Alexander and Ferdon, of Washington, D.C., were on the brief for defendant-appellees Crystal International Corp. and Flachglas A.G.

Morton L. Stone, Ulmer, Berne, Laronge, Glickman and Curtis, of Cleveland, Ohio, argued for defendant/appellees. With him on the brief was *Ronald H. Isroff.*

Appealed from: U.S. Court of International Trade
Judge NEWMAN.

(Appeal Nos. 85–2455 and 86–609)

JEANNETTE SHEET GLASS CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, CRYSTAL INTERNATIONAL CORP., ET AL., AND GLAVERBEL, S.A., DEFENDANTS-APPELLEES

Before SMITH and BISSELL, *Circuit Judges*, and SKELTON, *Senior Circuit Judge.*

SMITH, *Circuit Judge.*

ORDER

Appellee Glaverbel S.A. ("Glaverbel") moves to dismiss on the ground that the appeal is from a non-final order. Appellee United States ("Commission") supports the motion and appellant Jeannette Sheet Glass Corp. ("Jeannette") opposes it. We grant the motion and dismiss the appeal.

BACKGROUND

1. *Proceedings at the ITC and Court of International Trade*

On March 16, 1983, Jeannette filed a petition with the International Trade Commission ("ITC") and the Department of Commerce alleging that imports of thin sheet glass ("TSG") from Switzerland, Belgium, and the Federal Republic of Germany were materially injuring or threatening to injure materially the domestic industry. An antidumping investigation was initiated pursuant to 19 U.S.C. § 1673b(a). Section 1673 prescribes imposing a duty on imports being sold in this country at less than fair value if, by reason of imports of the involved merchandise, (1) an industry in this country is either materially injured or threatened with material injury or (2) the establishment of an industry in this country is materially retarded.

The ITC conducted a preliminary investigation and made two negative preliminary determinations. It concluded that there is no reasonable indication that: (1) the domestic regular quality TSG industry (*viz., Jeannette)* is materially injured or threatened with material injury by reason of imports of regular quality TSG from the three named countries allegedly sold at less than fair value ("LTFV"); and (2) the establishment of a high quality TSG industry in the United States is being materially retarded by reason of high quality TSG from Belgium or the Federal Republic of Germany allegedly being sold at LTFV. (*Thin Sheet Glass from Switzerland, Belgium and the Federal Republic of Germany,* Inv. Nos. 731–TA–127, 128 and 129 (Preliminary), USITC Pub. No. 1376 (May 1983)).

Jeannette challenged the two negative preliminary determinations at the Court of International Trade. In an order dated March 22, 1985, that court affirmed the ITC's determination of no "material retardation" in high quality TSG, in effect terminating the matter on that issue pending any review by this Court. *Jeannette Sheet Glass Corp.* v. *United States,* 607 F. Supp. 123 (1985). Regarding material injury in the regular quality TSG industry, the court decided that the "reasonable indication" standard used by the Commission was inconsistent with that used in *Republic Steel Corp.* v. *United States,* 591 F. Supp. 640 (1984), *reh'g. denied,* 16 Cust. B. & Dec., No. 14 (March 11, 1985). Consequently, it remanded the action for the ITC to reconsider its preliminary "no injury" determination in light of *Republic Steel* and to report to the court within 30 days its findings and redetermination. *Id.,* 607 F. Supp. at 133.

On June 11, 1985, the Court of International Trade denied without opinion the ITC's motion to amend judgment by certifying the "reasonable indication" question for interlocutory appeal under 28 U.S.C. § 1292(b).

On July 12, 1985, the ITC on remand applied the *Republic Steel* standard and reached an affirmative preliminary injury determina-

tion. On September 10, 1985, the Court of International Trade issued an order affirming that determination of the ITC.

2. *Appeals Here—"Injury" Determination*

Several appeals from the "injury" aspect of the March 22 remand order were filed by intervenors and docketed in this Court as Nos. 85–2554, 85–2555, and 85–2589. Jeannette moved to dismiss those appeals as interlocutory, and the motion was granted by order of June 2, 1986. That order also dismissed as interlocutory, *sua sponte*, Appeal Nos. 86–519 and 86–700. Those were appeals by the Commission and Glaverbel of the September 10 order.

On July 8, 1986, two petitions for rehearing of the June 2 order were denied by this Court without prejudice to the Court of International Trade amending its order to include a statement of certification under 28 U.S.C. § 1291(d)(1) or changing its order if so inclined.

3. *Appeals Here—"Material Retardation" Determination*

Jeannette's original appeal in this case (No. 85–2455) was an appeal of the same March 22, 1985 order involved in the dismissed appeals. Whereas those appeals focused on injury in the regular quality TSG industry, Jeannette's appeal focused on "material retardation" in the high quality TSG industry. Jeannette also filed a motion to dismiss or, in the alternative, to stay the appeal because "the order of March 22, 1985, is not final in all respects." Jeannette said that it filed the appeal only to safeguard its right to appeal but believed that its appeal was premature. It argued that Rule 54(b)[1] of the court's rules contemplates that a final judgment with respect to less than all the claims before the court will issue only where there is an express determination, which there is not in the March 22 order, that (1) there is no just reason for delay and (2) judgment should be entered. The order would become final, argued Jeannette, when the remand on "material injury" was complete.

Jeannette's motion was successful; the appeal in 85–2455 was stayed by this Court pending resolution by the Court of International Trade of the remaining issues.

After the Court of International Trade issued its order of September 10, 1985, Jeannette, who viewed that order as final, appealed from that portion of the order relating to material retardation. That appeal was filed here as No. 86–609. On Jeannette's motion, the two appeals (Nos. 86–609 and 85–2455) were consolidated and became No. 85–2455 to proceed in accordance with the briefing schedule previously established in No. 86–609. Briefs were filed and oral argument heard.

[1] Rule 54(b) reads as follows:

(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason or delay and upon and [sic] express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties.

Glaverbel now moves to dismiss the consolidated appeal, arguing that the case involves separate judgments—one for affirmance (no material retardation) and one for remand (material injury). Under Fed. R. Civ. P. 58, alleges Glaverbel, "every judgment shall be set forth on a separate document," but that was not done here, and hence, there is no jurisdiction to hear the appeal. Glaverbel also argues that, if appeals from the March 22 and September 10 orders of the CIT upon which this appeal is based were already dismissed as interlocutory in other cases, dismissal here is likewise warranted. The Commission supports the motion.

Jeannette opposes the motion, urging that, despite the trial court's failure to certify the "material retardation" issue presented for review, this Court should consider the appeal under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Not irrelevant to the motion is the rejection in *American Lamb Co.* v. *United States*, 785 F.2d 994 (Fed. Cir. 1986) of the "reasonable indication" standard adopted by the Court of International Trade in *Republic Steel* and *Jeannette Sheet Glass*. Based on *American Lamb*, the Commission on August 19, 1986, filed in *Jeannette* a motion for reconsideration of the injury issue, which is still pending before the Court of International Trade.

ISSUE

Whether this Court will decide, without proper certification by the Court of International Trade, an appeal of a claim resolved by a decision of that court when there is another claim that is still being pursued at the agency level.[2]

OPINION

Two orders are involved here: an order of March 22, 1985 and one of September 10, 1985. Both have two aspects, the first of which is identical in each, *i.e.*, the Court of International Trade affirming the preliminary determination at the ITC of no "material retardation" in the high quality TSG industry. That aspect is "final" in the sense that no further agency action is needed. However, the "material injury" aspect (in the regular quality TSG industry), though different in each order, is not final.

In the March 22 order, the "material injury" aspect involves a specific remand to the ITC for redetermination in light of a standard the Court of International Trade believed correct (but which has since been held incorrect by this Court). That clearly is non-final, as Jeannette and the Commission apparently concede, and as this Court held in its order dated June 2.

The June 2 order also held that the "material injury" aspect of the September 10 order was non-final, based on the authority of

[2] Because that question is answered in the negative, we do not address Glaverbel's Rule 58 argument.

Cabot Corp. v. *United States,* 788 F.2d 1539 (Fed. Cir. 1986). We are in agreement with that holding. In *Cabot,* an order of the Court of International Trade, which remanded the case to the ITC for further findings and redeterminations to be reported to the court within 90 days, was held to be interlocutory in nature. Though the September 10 order affirmed the ITC's preliminary "injury" determination, it was not final under *Cabot* because further proceedings at the agency level were necessary before the case became final. Thus, a final determination of no injury had to be made at the ITC and a preliminary and final determination of LTFV had to be made at the International Trade Administration ("ITA") of the Department of Commerce. *American Lamb Co.* v. *United States,* 785 F.2d 994, 998–99 (Fed. Cir. 1986).

Hence, the issue before us is the same with respect to both the March 22, 1985 and September 10, 1985 orders: whether Jeannette can seek to appeal the final part of an order comprising a final and a non-final part. Those "parts," however, are in essence dispositions of two "claims" within the scope of Rule 54(b) of the United States Court of International Trade Rules, which is identical to Fed. R. Civ. P. 54(b). The non-final "claim" concerns "dumping" regular quality TSG at LTFV and the final claim concerns "dumping" high quality TSG at LTFV. That is a classic situation for Rule 54(b) certification, yet there was none here. Without it, the appeal must be dismissed.[3]

As stated by this Court in *Aleut Tribe* v. *United States,* 702 F.2d 1015, 1020 (Fed. Cir. 1983): "[a]n appeal from the order that disposes of only some claims of an action may *not* be made without waiting for a decision on the remainder of the case, unless the requirements of Rule 54(b) of the Federal Rules of Civil Procedure are met." (Emphasis in original). Thus,

> Rule 54(b) requires two steps before an appeal can be perfected. The trial judge must make (1) 'an express determination that there is no just reason for delay,' and (2) an 'express direction for the entry of judgment.' The 'combination of the direction and determination can be referred to as a "certification" that a particular judgment is ripe for review.' 10 C. Wright & A. Miller, Federal Practice and Procedure § 2660, at 82 (1973).

Id.

Under Rule 54(b), the trial judge "is a 'dispatcher' who decides whether to release his decision for appellate consideration by making an express determination that there is no just reason for delay. (Cases omitted.)" *Id.* at 1020–1021. The trial judge is permitted "to determine, in the first instance, the appropriate time when each 'fi-

[3] Nor was there certification under 28 U.S.C. § 1291(d)(1), which states:

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after entry of such order.

nal decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Id.* at 1021. As stated in *Samuel* v. *University of Pittsburgh*, 506 F.2d 355, 361 (3rd Cir. 1974), "the knowledge bred of the district court's proximity to the case can be brought to bear on the question of the propriety of immediate review." *See also Sargeant* v. *Johnson*, 521 F.2d 1260, 1264 (8th Cir. 1975) (the appeal here "fails to appreciate the salutory purpose and importance of Rule 54(b).").

Certification is therefore within the discretion of the trial judge who should "carefully consider[ed] the competing equities." *Chaparral Communications, Inc.* v. *Boman Industries, Inc.*, 798 F.2d 456, 459, 230 USPQ 535, 537 (Fed. Cir. 1986) ("the need for an immediate appeal was clearly outweighed by the policy against piecemeal adjudication."). Though "there *may* be exceptional cases where an appellate court is justified in mandamusing the district court to execute the certificate, * * * as a general proposition a refusal to execute * * * will not be interfered with by an appellate court." 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶54.41[3] at 751 (hereafter "Moore's Federal Practice") (emphasis added.) *Cf. Makuc* v. *American Honda Motor Co.*, 692 F.2d 172, 173 (1st Cir. 1982) ("we are unaware of any cases in which a court of appeals has reviewed the denial of a Rule 54(b) motion * * * [or] * * * where mandamus powers have been applied to require the granting of a Rule 54(b) motion.").

Jeannette would have us ignore Rule 54(b) and decide the appeal under the collateral order exception to the "final order" rule. To fall within the exception, a collateral order must at a minimum: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Cabot Corp.* v. *United States*, 788 F.2d 1539, 1543 (Fed. Cir. 1986). However, given the strong policies underlying Rule 54(b), and finality in general, we will not engraft in this case the collateral order exception onto the Rule 54(b) requirement.

The "final order" rule reflects a "strong congressional policy against piecemeal reviews and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *Heat & Control, Inc.* v. *Hester Industries, Inc.*, 785 F.2d 1017, 1020, 228 USPQ 926, 928 (Fed. Cir. 1986) (quoting *United States* v. *Nixon*, 418 U.S. 683, 690 (1974)). The Supreme Court in recent decisions has indicated that departure from the rule will be allowed "only for the *limited* category of cases falling within the 'collateral order' exception delineated in *Cohen* v. *Beneficial Industries Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949)." *Cabot Corp.* v. *United States*, 788 F.2d 1539, 1543 (Fed. Cir. 1986) (emphasis added.) That exception is a "narrow" one whose reach is limited to trial court orders affecting rights that will be "irretrievably lost" in the absence

of an immediate appeal. *Richardson-Merrell, Inc.* v. *Koller,* 105 S. Ct. 2757, 2761 (1985).

Adopting Jeannette's argument would improperly extend the narrow *Cohen* exception to orders that are not merely "collateral" to the main action, but are the very claims themselves. We will not do that here. Instead, we approve of the rationale expressed in *Hooks* v. *Washington Sheraton Corp.,* 642 F.2d 614 (D.C. Cir. 1980). There, plaintiff contended that the Rule 54(b) need for certification was inapplicable because certain third party claims were "collateral" to the basic dispute resolved by the judgment entered by the clerk. Plaintiffs urged what the court characterized as a "reverse collateral order" theory, maintaining that the clerk entered judgment should be considered final and outside the scope of Rule 54(b) because the remaining claims were collateral thereto. The Court rejected that argument. It reasoned that the collateral order doctrine applies only to "certain remedial and procedural matters that are separable from and not ingredients of any identifiable claims for relief" and it does not apply when the collateral matters "themselves constitute the claims for relief." 642 F.2d at 618. Citing "two notable commentators" (10 C. Wright & A. Miller and 6 Moore's Federal Practice), the Court stated:

> Without question the better view is that *Rule 54(b) applies only when there are multiple claims and the collateral order doctrine applies to the determination of a matter that really is not an ingredient of any identifiable claim.* A 'claim' for purposes of the collateral order doctrine, like the request for security for costs in Cohen, is not a 'claim for relief' within the meaning of Rule 54(b) inasmuch as the rule refers only to claims in the sense of the substantive right being asserted—the cause of action—rather than requests that are incidental to the procedure for obtaining a judicial award and enforcing it.

Id. at 618. (Emphasis in original.) *See also United States Bonding Ins. Co.* v. *Stein,* 410 F.2d 483, 486 n.3 (3rd Cir. 1969) (appellant appealed without Rule 54(b) certification the grant of summary judgment on one of multiple claims; the court rejected an argument based on *Cohen,* reasoning that "the object of the summary judgment was one of the claims for relief sought in the action and was most certainly one of the ingredients of the substantive claim.") *See generally* 6 Moore's Federal Practice, ¶54.31 at 473–75.

By-passing Rule 54(b) under the guise of *Cohen* would be especially troublesome in this case. Jeannette argues that the material retardation aspect of the order, relating to the high quality TSG industry, "addressed specific facts and specific legal issues * * * that had nothing to do with the facts and legal issues regarding material *injury* of the *regular quality* TSG industry" (emphasis in original). Yet, when Jeannette earlier moved to dismiss or stay the original appeal in No. 85–2455, it argued that "[m]any of the facts involved in this litigation, particularly those facts concerning the manufac-

turing process and the steps necessary to produce 'high quality' versus 'regular quality' thin sheet glass, are pertinent to both the issue of material injury and the issue of material retardation." We should not have to sort those arguments as part of a *Cohen* analysis. Rule 54(b) properly requires the trial judge to sort them out and allow appeal of one of the claims if he or she deems it appropriate.

The trial judge should also be the one to test Jeannette's argument that it will be harmed by an inability to obtain immediate review. By the time later review occurs, argues Jeannette, it may already be in the high quality TSG market, making the relevant inquiry "material injury," not material retardation. Or, Jeannette argues, the "material retardation" may have been so successful by the time final appeal arrives that Jeanette is no longer in the position of being able to enter the high quality TSG industry. No one can better assess those speculative arguments than the trial judge who sat through a trial involving those industries. Rule 54(b) allows him or her to do that.

Also relevant to our decision is that the trial judge has before him the Commission's motion to reconsider, in light of this Court's decision in *American Lamb,* the "injury" aspect of the case and to affirm the ITC's earlier holding of no preliminary injury. Resolution of that motion in the Commission's favor could speed up greatly the material injury aspect of this case, leading to that aspect and "material retardation" being before us in the near future.

Jeannette argues that *Maier* v. *Orr,* 754 F.2d 973, *reh'g. denied,* 758 F.2d 1578 (Fed. Cir. 1985) supports its position. *Maier* involved a district court order commanding the Secretary of the Air Force to reinstate Maier on active duty with back pay, retroactive promotions, longevity credit, and other entitlements which she would have received had she not been improperly discharged. This Court rejected Maier's argument that the order was not final and thus not appealable. It held that the order was sufficiently injunctive in nature to justify this Court taking jurisdiction under § 1292(a)(1).[4] The order in this case, however, is not of the injunctive type—hence, *Maier* is distinguishable.

The *Maier* court in dicta added: "Moreover, the order is so fundamental to the litigation that both policy and common sense would dictate that [the Court should] assume jurisdiction under the rule of *Gillespie* v. *U.S. Steel Corp.,* 379 U.S. 148." *Gillespie* illustrates an exception to finality that has on occasion been used by this Court, *Tenneco Resins, Inc.* v. *Reeves Bros., Inc.,* 736 F.2d 1508, 222 USPQ 276 (Fed. Cir. 1984), and its predecessor, *Knickerbocker Toy Co.* v. *Faultless Starch Co.,* 467 F.2d 501, 175 USPQ 417 (CCPA 1972). It

[4] 28 U.S.C. § 1292(a)(1) states:
§ 1292. Interlocutory decisions
(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

focuses on whether the order in question is distinct from the remaining allegations and on whether judicial economy will be served. *Gillespie,* however, is to be very rarely used. As stated in *Cabot,* 788 F.2d at 1544, "there is no warrant here for applying the *Gillespie* rationale beyond the unique facts of that case." *Accord Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 477 n.30 ("If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance."). As in *Cabot,* there is no warrant here to apply *Gillespie.*

In dismissing this appeal, we are not unaware of this Court's recent decisions in *Dewey Electronics Corp.* v. *United States,* No. 86–612, (October 1, 1986) and *Teller Environmental Systems, Inc.* v. *United States,* No. 85–2676 (October 1, 1986). Dewey appealed from an order of the Armed Services Board of Contract Appeals (Board) finding the government not liable on four claims of equitable adjustment, pricing of certain items, and interest, but liable on five other claims. The Board remanded the five claims to the contracting officer to determine quantum. The government argued that the order was non-final because of the remanded claims. This Court decided that the Board made a final decision on the four claims that were the subject of the appeal and that the appeal should not be deferred pending resolution of quantum on the other five claims.

In *Dewey* it was determined that the statute granted the Board jurisdiction to review decisions of contracting officers and that, because only liability on the claims had been decided (constructively) by the contracting officer, the "Board decided all of the issues before it." *Dewey* also noted that the legislative history of the Contract Disputes Act and "longstanding practice of agency boards * * * counsel against applying a rigid district court concept of finality." The court concluded that the appeal was appropriate even though some of the claims were being returned to the agency for quantum determination. In *Teller,* however, the court held that where liability and quantum on a claim were both before the Board, an appeal of the Board's liability decision was premature because of the Board's remand to the contracting officer for quantum determination.

The decisions in *Dewey* and *Teller* are unique to the contract area and are not applicable here. We are constrained by *Cabot,* which broadly states "that an order remanding a matter to an administrative agency for further findings and proceedings is not final." 788 F.2d at 1542. We will not deviate from it in the context of an appeal from the Court of International Trade of an order remanding back to the ITA or ITC—whether the remand is of the precise issue decided by the trial court (as in *Cabot*) or whether the remand is of one of two issues, the other being final (as here). Moreover, just as the *Cabot* court was swayed by the possibility of certification under 28 U.S.C. § 1292(d)(1), we are swayed by the availability in this multiple claims situation of certification under Rule 54(b).

Accordingly,

IT IS ORDERED THAT:

Glaverbel's motion to dismiss is granted and this appeal is dismissed, without prejudice to the Court of International Trade to certify the case. Just as in *Aleut Tribe* v. *United States*, 702 F.2d 1015, 1021 (Fed. Cir. 1983):

> If the requisite certification is obtained, the parties may, of course, proceed upon the same briefs, record, and arguments presented in this dismissed appeal, and these may be supplemented if necessary by papers describing any further proceedings in the * * * Court [of International Trade]. See 10 C. Wright & A. Miller, *supra* § 2660, at 89 & n.87 (1973 & Supp. 1981). We express no opinion as to whether a Rule 54(b) certification should be made, as this is a matter that is within the discretion of the trial judge.

Dated: October 23, 1986.

FOR THE COURT,
Edward S. Smith,
Circuit Judge.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–118)

LONE STAR STEEL CO. AND CF & I STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85–06–00790

[Motion to dismiss as moot denied.]

(Decided November 12, 1986)

Akin, Gump, Strauss, Hauer & Feld (Richard R. Rivers, Warren E. Connelly, Valerie A. Slater and *William J. Long)* for plaintiff.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile*, Assistant General Counsel, and *E. Clark Lutz*, United States International Trade Commission, for defentanys.

Mudge, Rose, Guthrie, Alexander & Ferdon (David P. Houlihan and *Jeffrey S. Neeley)*, for defendant-intervenor.

OPINION

RESTANI, *Judge:* This action challenges a negative injury determination regarding oil country tubular goods from Argentina. The court has befor it defendant intervenor Dalmine Siderica, S.A.I.C.'s motion to dismiss as moot, in which the International Trade Commission ("ITC") concurs.

The relevant facts are as follows. On July 23, 1984, ITC issued a preliminary *affirmative* injury determination. On January 16, 1985 the International Trade Administration of the Department of Commerce ("Commerce") issued an *affirmative* preliminary determination of sales at less than fair value ("LTFV"). Thereafter, a suspension of liquidation (finalization of assessment of duties) went into effect. On March 29, 1985, Commerce issued an *affirmative* final determination of sales of LTFV. On May 22, 1985, however, ITC issued a final *negative* injury determination. At this point the suspension of liquidation, premised on the preliminary antidumping findings, terminated.

On July 22, 1985, in order to take advantage of changes in the law regarding cumulation of effects of imports from various countries for injury determination purposes, plaintiffs filed a new peti-

tion under the antidumping duty laws covering the same products.[1] ITC again rendered an affirmative preliminary injury determination. Commerce commenced a new LTFV investigation covering the period from February 1, 1985 to July 31, 1985, rather than the three year period examined in the first case. This investigation resulted in an affirmative preliminary determination of sales at LTFV on January 27, 1986. Subsequent review, however, resulted in a final negative LTFV decision from Commerce. This decision has been challenged in another action.

The question before the court is what relief may the court grant if plaintiff is successful in this action. If there are past entries remaining to be liquidated which are only affected by this action, then a decision rendered by this court will have effect. Furthermore, if despite the second proceeding, judicial review of the first proceeding will have future legal impact, this action is not moot.

The basic issue here is what is the effect of commencement of a second antidumping petition and resulting determination affecting the same product. One might theorize that every entry presents a separate cause of action. What is before the court for review, however, is agency action, not with regard to single entries, but with regard to imports of specific products from specific countries during a specific time period. What is affected are individual entries which occur for an indefinite time forward. Because different time periods are under consideration, different determinations may result. An action with regard to one determination does not address the same *res* as does an action with regard to another determination. Consequently, principles of *res judicata* do not apply.[2] Restatement (Second) of Judgments § 24(2) (1980).

A question remains as to whether the statutory scheme otherwise makes the first action moot because of the commencement of the second proceeding and the determinations which result therefrom. As to past entries, including those not possibly affected by the second proceeding, plaintiffs argue that the first proceeding may have some effect because all entries after September 12, 1984 are unliquidated as a result of a suspension of liquidation under the countervailing duty laws. Plaintiffs' view is that liquidation of an entry is a unitary event; an entry is either liquidated as to all duties or it is liquidated as to none. This is neither the current administrative view with regard to the imposition of additional duties, as is evidenced by the positions taken in this case, nor does it comport with antidumping and countervailing duty laws.

There are two general provisions for suspension of liquidation following preliminary affirmative determinations under the unfair trade practices law. For antidumping cases, the provision is found at 19 U.S.C. § 1673b (1982). For countervailing duty cases the provision is found at 19 U.S.C. § 1671b (1982 & Supp. III 1985). 19 U.S.C.

[1] The amendments regarding cumulation were added to 19 U.S.C. § 1677(7)(C)(iv) (1982 & Supp. III 1985) by the Trade and Tariff Act of 1984, Pub. L. 98-573, § 612 (a)(2)(A) (1984).

[2] Similarly, principles of administrative *res judicata* are inapplicable.

§ 1673d(c)(2) (1982) provides for the termination of the suspension upon a negative finding under the antidumping laws. The corresponding provision of the countervailing duty law is found at 19 U.S.C. § 1671d(c)(2) (1982). Furthermore, 19 U.S.C. § 1673e(b) (1982) calls for antidumping duties to be imposed under certain circumstances on entries the liquidation of which has been suspended under the antidumping duty laws. The corresponding countervailing duty provision is found at 19 U.S.C. § 1671e(b) (1982).

Throughout the statutory scheme, the provisions affecting suspension are kept separate. One of the reasons for this may have been to fulfill commitments made pursuant to international agreement. For example, the Agreement of Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (commonly known as the GATT Subsidies Code), provides that: "The imposition of provisional measures shall be limited to as short a period as possible, not exceeding four months." General Agreement on Tariffs and Trade, April 12, 1979, art. 5, para. 3, 31 U.S.T. 513, 516, T.I.A.S. No. 9619, at 4, 1186 U.N.T.S. ——, ——. If a suspension following a preliminary determination under the antidumping laws could extend the suspension in countervailing duty cases it might conflict with this provision. There is a similar provision in the GATT antidumping code. General Agreement on Tariffs and Trade, April 12, 1979, art. 10, para. 3, 31 U.S.T. 4919, 4934, T.I.A.S. No. 9650, at 16, 1186 U.N.T.S. ——, ——. In fact, in *United States Steel Corporation* v. *United States*, 9 CIT ——, 618 F. Supp. 496 (1985), *appeal dismissed*, 792 F.2d 1101 (Fed. Cir. 1986), which discussed the countervailing duty provision, the court treated the two potential suspensions separately. Although a suspension of liquidation of some entries was in effect under the antidumping laws, the court concluded that an overlapping countervailing duty suspension had ceased. Thus, in order to administer the laws in a reasonable manner and to steer clear of violation of international commitments, the suspensions are viewed as operating independently. Nothing in the language of the statute contradicts this, nor have the parties presented any evidence of a contrary administrative practice.[3] Therefore, in accordance with antidumping laws, the need to make deposits and the provisional suspension of liquidation terminated upon the negative finding in May, 1985. *See* 19 U.S.C. § 1673d(c)(2). As a result, most past entries are no doubt liquidated without assessment of antidumping duties.[4] The court's opinion can have no effect on liquidated entries. This is not so as to future entries, nor potentially as to unliquidated past entries.

19 U.S.C. § 1516a(c) & (e) (1982) indicate that pending judicial review, unless such liquidation is enjoined by the court, entries are to

[3] The court in *Ambassador Division of Florsheim Shoes* v. *United States*, 748 F.2d 1560, 1562 (Fed. Cir. 1984) interprets 19 C.F.R. § 159.1 to mean "[no duties] can be liquidated until all of them are." Dual proceedings were not before the court in *Florsheim*, therefore, the court's statement cannot be viewed as resolving the issue presented here.

[4] 19 U.S.C. § 1504 (1982 & Supp.III 1985) would have effected liquidation by operation of law within a year of the cessation of the suspension of liquidation.

be liquidated in accordance with the challenged administrative determination. Entries subject to the court's injunction and entries *made following* publication of notice of a contrary court opinion will be liquidated in accordance with the court's opinion. *See Melamine Chemicals* v. *United States*, 732 F.2d 924 (Fed. Cir. 1984) and *Bomont Industries* v. *United States*, 10 CIT ——, 638 F. Supp. 1334 (1986). To date there is no injunction here, but a judicial decision which results in an affirmative finding, and therefore an antidumping duty order, will mandate deposits on future entries pursuant to 19 U.S.C. § 1673e(a)(3) (1982). There is some potential for conflict with the result of the second proceeding. As long as those results remain negative, they will have no effect and hence will present no conflict. If they become affirmative, any conflict in deposit rates will have to be resolved. This does not seem an insurmountable problem.

In the papers filed before the court, the parties have cited no statutory provision which leads to the conclusion that the first action must cease because of the existence of the second proceeding. In fact, the agencies allowed the two proceedings to continue simultaneously. Because this action may have an effect on future entries it is not moot.

ORDERED: Defendant's motion to dismiss as moot denied.

(Slip Op. 86–119)

BRITISH STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANTS, ALLEGHENY LUDLUM STEEL CORP., ET AL., DEFENDANTS-INTERVENORS

Court No. 83–7–01032

Before BERNARD NEWMAN, *Senior Judge.*

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

[Plaintiffs' application granted.]

(Dated November 12, 1986)

Steptoe & Johnson (Richard O. Cunningham, Charlene Barshefsky and *William L. Martin, II, Esqs.*, of counsel) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch and *Sheila N. Ziff, Esq.*, for defendants.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Esq., of counsel) for defendants-intervenors.

BERNARD NEWMAN, *Senior Judge:*

I

Presently before the court is plaintiffs' application for an injunction pending appeal of this court's recent decision in *British Steel Corporation* v. *United States*, 12 CIT ——, Slip Op. 86–104 (October

17, 1986). Plaintiffs again seek to prevent defendants from liquidating any entries of stainless steel plate from the United Kingdom entered or withdrawn from warehouses for consumption on or after April 1, 1985 and exported prior to March 1, 1986 (hereinafter referred to as the 1985–86 entries). A temporary restraining order was issued by the court on October 23, 1986 and extended to November 12, 1986.

In Slip Op. 86–104, this court denied plaintiffs' request for a preliminary injunction restraining liquidation of the 1985–86 entries pending a final decision on the merits of their claim that the Commerce Department has wrongfully refused to conduct an administrative review covering that time period. There, the court held that insofar as plaintiffs sought to raise a new cause of action relating to the refusal to Commerce to initiate an administrative review in accordance with section 751 of the Trade Agreements Act of 1979, 19 U.S.C. § 1675, covering the 1985–86 entries, such new claim could not now be "bootstrapped" into the present action which contests the final countervailing duty determination and order issued in 1983. The court, however, left it open for plaintiffs to pursue their new claim that Commerce is required to commence an administrative review covering the 1985–86 entries by instituting an action under 28 U.S.C. § 1581(i) and renewing their request to enjoin liquidation of the 1985–86 entries. Slip Op. 86–104, at p. 10. Plaintiffs state that they are not appealing from that aspect of the court's decision in Slip Op. 86–104.

In Slip Op. 86–104, this court also rejected plaintiffs' argument that apart from the issue of whether Commerce has wrongfully refused to conduct an administrative review of the countervailing duty order covering the 1985–86 entries pursuant to section 751, this court has jurisdiction in the current action under 19 U.S.C. § 1516a(c)(2) to enjoin liquidation of those entries pending a final decision on the merits. In essence, it is plaintiffs' firm conviction that irrespective of the administrative review procedures provided by section 751, the 1985–86 entries may ultimately be liquidated on the basis of the administrative record and final decision in the present action simply by now enjoining liquidation of the entries in accordance with § 1516a(c)(2). However, in Slip Op. 86–104 this court agreed with defendants' and intervenors' position that the 1985–86 entries would be liquidated pursuant to the record and administrative proceedings conducted under section 751, if such review were timely requested, and that absent such request, Commerce is required to liquidate those entries in compliance with its regulation 19 CFR § 355.10(d). The foregoing regulation directs that liquidation be made on the basis of the cash deposit rate at the time of entry in cases where no timely request for a section 751 review has been made.

Plaintiffs have appealed to the Court of Appeals for the Federal Circuit seeking review of the foregoing aspect of Slip Op. 86–104

(part II thereof), and now request that this court issue an injunction pending appeal to prevent liquidation of the 1985–86 entries until the Court of Appeals has had an opportunity to complete its review. Defendants and intervenors oppose plaintiffs' request.

II

The court now addresses the oft-repeated traditional four criteria relevant to a request for injunctive relief. *See e.g. Zenith Radio Corp.* v. *United States,* 1 CAFC 74, 710 F.2d 806, 809 (Fed. Cir. 1983); *S.J. Stile Associates, Ltd.* v. *Snyder,* 68 CCPA 27, 30, 642 F.2d 522, 525 (1981); *UST, Inc.* v. *United States,* 12 CIT ——, Slip Op. 86–100 (October 10, 1986). The criteria employed in issuing an injunction pending appeal are substantially identical to those used in issuing a preliminary injunction. *Timken Co.* v. *United States,* 6 CIT 76, 81, fn. 7, 569 F. Supp. 65, 70, fn. 7 (1983).

Plaintiffs' request meets the irreparable harm criterion for granting injunctive relief. Liquidation of the involved entries by Customs clearly would moot the appeal of Slip Op. 86–104. *Cf. Zenith Radio Corp.* and *Timken Co., supra.* If no injunction pending appeal were granted, and this court's decision in Slip Op. 84–104 were reversed by the Court of Appeals, plaintiffs would achieve only a "hollow victory". *Cf. J. Weingarten* v. *Potter,* 233 F. Supp. 833, 839 (S.D. Tex., 1964).

In the circumstances presented here, the court further holds it is sufficient that plaintiffs have raised questions which are "serious, substantial, difficult and doubtful", and plaintiffs need not show that there is probability of success on the merits, particularly where, as here, the balance of equities weighs heavily in favor of granting injunctive relief. *Cf. Timken Co.* and cases cited therein. *See also American Air Parcel Forwarding Company, Ltd.* v. *United States,* 1 CIT 293, 515 F. Supp. 47 (1981).

There is no doubt that under 19 U.S.C. § 1516a(c)(2), liquidation of entries covered by a challenged countervailing duty determination may be enjoined pending judicial review. However, the precise issue raised by plaintiffs' application in Slip. Op. 86–104 is whether entries made in the 1985–86 time period, which could be the subject of an administrative review under section 751 if requested, may be enjoined in the pending court action contesting the underlying countervailing duty order. As is apparent, the 1985–86 entries sought to be enjoined were made several years after the time period and entries investigated by Commerce prior to the 1983 countervailing duty order, and that order has never been administratively reviewed respecting these 1985–86 entries.

The issue presented by plaintiffs' appeal is one of the first impression because prior to 1984, administrative reviews under section 751 were automatically initiated by Commerce, whereas under the

Tariff and Trade Act of 1984 such reviews are commenced only on the request of an interested party.[1] The 1984 amendment of section 751 was explicitly intended by Congress "to reduce the administrative burden on the Department of Commerce of automatically reviewing every outstanding order even through circumstances do not warrant it *or parties to the case are satisfied with the existing order*". H.R. Rep. No. 98–725, 98th Cong. 2d Sess. 22–23, 1984 *U.S. Code Cong. & Ad. News* 5149 (emphasis added). Conversely, if an interested party is dissatisfied for any reason with an existing order, such party is required under section 751, as amended, to request an administrative review. Absent such a request, Customs is directed by regulation to assess duties on the entries in the relevant time period at rates equal to the cash deposit or bond required at the time of entry. 19 CFR § 355.10(d). In this court's view, Congress did not contemplate in its 1984 amendment to section 751 that a party dissatisfied with a 1983 countervailing duty order could bypass administrative review regarding 1985–86 entries and instead enjoin liquidation of such entries pending the court challenge to the countervailing duty order.

So far as the court is aware, this is the first instance in which the issue is presented as to whether in the absence of a section 751 administrative review covering the relevant time period, the court has jurisdiction to enjoin liquidation of entries falling within that review period. As previously mentioned, plaintiffs insist that pursuant to 19 U.S.C. § 1516a(c)(2), the presently pending court action challenging the countervailing duty order may serve as the underlying vehicle for obtaining injunctive relief covering the 1985–86 entries. The novel issue presented is of major importance in the administration of the countervailing duty law, and thus injunctive relief pending appellate review would serve the public interest.

Significantly, whereas on the one hand liquidation of the involved entries prior to resolution of plaintiffs' appeal would moot the appeal and cause irreparable injury to plaintiffs, granting injunctive relief pending appeal would not cause defendants, intervenors or the public any significant hardship. The subject merchandise has already been entered and cash deposits have been made. Hence, the balance of hardships tips decidedly in favor of plaintiffs.

In sum, plaintiffs have satisfied the four criteria for granting injunctive relief.

---

[1] Indeed, as pointed out in Slip Op. 86–104, pp. 3–4, Commerce is presently conducting annual reviews of the 1983 countervailing duty order as required by section 751 for the periods February 10, 1983 to March 31, 1984, and April 1, 1984 to March 31, 1985. When issued, the final results of these reviews may be challenged by plaintiffs and the liquidation of the entries covered by those reviews enjoined under 19 U.S.C. § 1516a. If, as plaintiffs previously claimed, they are entitled to an administrative review under § 751 covering the 1985–86 entries, plaintiffs again will have the opportunity to challenge any erroneous valuation methodologies Commerce employed by contesting the final results of the review. Plainly, this court would then have jurisdiction under § 1516a(c)(2) to enjoin liquidation of entries pending judicial review of the results of the administrative reviews.

At this juncture, the court wishes to observe that in an action where an interested party challenges certain negative aspects of a final affirmative countervailing duty determination (*i.e.*, that certain programs do not constitute subsidies), these negative aspects would be judicially reviewable only in the action challenging the final affirmative countervailing duty determination and order; consequently, entries made in a subsequent annual review period may be enjoined in the action contesting the countervailing duty order. But those circumstances do not exist here.

Accordingly, plaintiffs' request to enjoin liquidation of the 1985–86 entries pending an appeal of this court's decision in Slip Op. 86–104 is granted; an appropriate order will be entered concurrently herewith to that effect.

The court anticipates that plaintiffs will prosecute their appeal with reasonable expedition.

(Slip Op. 86–120)

AMERICAN PERMAC, INC., BOEWE SYSTEM & MACHINERY, INC., AND BOEWE MASCHINENFABRIK, GMBH, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85–1–00077

Before WATSON, *Judge.*

MEMORANDUM OPINION AND ORDER

[Plaintiffs' motion for judgement on the agency record is denied. The action is dismissed.]

(Decided November 13, 1986)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr.), for the plaintiffs.

Lyn M. Schlitt, General Counsel; *Michael P. Mabile*, Assistant General Counsel, United States International Trade Commission (*Jack M. Simmons, III*), for defendant.

WATSON, *Judge:* Plaintiffs, a West German manufacturer of drycleaning machinery and its American importer and distributor[1] ("Boewe et al."), brought this action challenging a final determination of the International Trade Commission ("ITC" or "Commission"). The determination arose from an administrative review conducted pursuant to § 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b) (1982).[2] The ITC concluded that West German imports of drycleaning machinery would materially injure the domestic industry if the antidumping duty order covering those imports were modified or revoked. *Drycleaning Machinery From the Federal Republic of Germany*, Inv. No. 751–TA–9 (Final), USITC Pub. 1617 (Dec. 1984). Plaintiffs have filed a motion for judgement upon the agency record, pursuant to Rule 56.1 of this Court, seeking reversal of the determination on the ground that it is not supported by substantial

[1] Plaintiffs are Boewe Maschinenfabrik GmbH (West German manufacturer/exporter); Boewe System & Machinery, Inc. (importer); and American Permac, Inc. (distributor/marketing representative).

[2] 19 U.S.C. § 1675(b) (1982) provides, in pertinent part:

> (b) Reviews upon information or request.—
> (1) In general.—Whenever * * * the Commission receives * * * a request for the review of * * * an affirmative determination made under section * * * 1673d(b) of this title, which shows changed circumstances sufficient to warrant a review of such a determination, it shall conduct such a review after publishing notice of the review in the Federal Register * * *.
>
> (2) Limitation on period for review.—In the absence of good cause shown—
>
> (A) the Commission may not review a determination under section * * * 1673d(b) of this title * * *
>
> less than 24 months after the date of publication of notice of that determination or suspension.

Although not applicable in this case, the Trade and Tarriff Act of 1984 amended § 1675(b)(1) by adding at the end the following sentence: "During an investigation by the Commission, the party seeking revocation of an antidumping order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the antidumping order." Pub. L. 98–573, § 611(a)(2)(B)(iii), 98 Stat. 3031 (1984). *See* Pub. L. 98–573, § 626(b)(1), 98 Stat. 3042 (effective date).

evidence on the agency record. For the reasons that follow, the Court concludes that the Commission's determination is supported by substantial evidence and is otherwise in accordance with law.

ITC Determination

In 1972, following an injury determination by the United States Tariff Commission (predecessor to the ITC), the Treasury Department issued an antidumping finding covering drycleaning machinery imported from West Germany. T.D. 72–311, 37 Fed. Reg. 23715 (Nov. 8, 1972). That finding remained in effect on the effective date of the Trade Agreements Act of 1979, and thus became subject to the administrative review procedures set forth in 19 U.S.C. § 1675(b). *See Matsushita Electric Industrial Co., Ltd.* v. *United States*, 2 CIT 263, 529 F. Supp. 670 (1981). In May 1984, plaintiffs, Boewe et al., filed a request for such a review with the ITC. The Commission thereafter determined that changed circumstances existed sufficient to warrant a review investigation, and published notice of the investigation in the Federal Register on August 15, 1984 (49 Fed. Reg. 32692). The ITC review covered the drycleaning machinery imports of two West German manufacturers, petitioner Boewe Maschinenfabrik GmbH ("Boewe"), and Seco Maschinenbau GmbH & Co. Kommanditgesellschaft ("Seco"). A public hearing was held on October 31, 1984. Plaintiffs were the only private parties to participate in the investigation or to appear at the hearing.[3]

Plaintiffs' presentation at the public hearing consisted primarily of testimony by Peter Boden, chairman of the plaintiff West German producer/exporter, and William A. Hayday, president of the plaintiff importing and marketing subsidiaries. Boden and Hayday indicated that Boewe's current pricing policy calculates prices for the same models which are uniform throughout the world and do not include dumping margins. They stated that removal of the dumping order would have no effect on Boewe's pricing structure. They also testified that limitations in Boewe's production capacity would prevent any short-term material increase in shipments to the United States market beyond current projections.

In its final determination, published in December, 1984, the Commission described its task as follows:

> As stated in *Television Receiving Sets From Japan* [Inv. No. 751–TA–2, USITC Pub. 1153 at 9 (1981)], Section 751(b) requires us—
>
> > * * * to assess the inhibiting effect that the [outstanding anti-dumping] order has on the pricing, production, and marketing strategies of companies subject to it, to predict the effect of revocation on those strategies and on the market place, and then to determine whether those effects

[3] A representative of Vic Manufacturing Co., one of the domestic producers, appeared as a non-party participant and was permitted to testify.

> would result in material injury or threat thereof to the domestic industry.
>
> Section 751(b) evaluations assume that any dumping is being offset by the existing order and require us to forecast what will happen if the order is revoked or modified. The analysis starts from the legally required assumption that [less-than-fair-value] sales will continue or resume once the dumping order is removed, and consists of two steps: (1) forecasting the likely behavior of the foreign manufacturers and the importers in the event the antidumping order were revoked or modified; and (2) determining whether injury to a domestic industry would result from the modification or revocation of the antidumping order based on that forecast.

USITC Pub. 1617 at 4–6 (footnotes omitted).

The Commission first examined the effect of revocation of the antidumping order on West German producers and concluded, despite the contrary declarations of plaintiffs' witnesses, that revocation would affect the volume and price of West German imports. With respect to volume, the Commission found that Boewe had the intent and the capability to increase the volume of exports to the United States in the immediate future. Most Boewe machines currently exported to the United States are of its "flexible" (or "flex") models—so called because they can be modified to increase or decrease capacity—which Boewe developed specifically for the American market. The Commission noted that imports from West Germany have increased substantially beginning in 1983 (when Boewe introduced its "flex" line), and that Boewe's stated numerical goal for exports to the United States was significantly higher than present levels. With respect to pricing, the Commission found that some degree of price competition existed between West German and domestic machines, and that revocation of the antidumping order would permit greater price flexibility for West German imports. The Commission concluded that an increase in market penetration by West German imports would be aided by revocation of the antidumping order. *Id.* at 8–11. The Commission noted, however, that its analysis was complicated by the fact that no final dumping margins had been calculated since 1974, and the only available preliminary margins from the International Trade Administration ("ITA") of the Commerce Department were issued in 1981 (covering entries between July 1979 and June 1980)[4] and thus antedated the introduction of Boewe's "flex" machines. *Id.* at 10 n. 38.

[4] The ITA's preliminary weighted average margin calculation for the Boewe imports covered by the first periodic review was 65.98 percent. 46 Fed. 60868. The ITA did not publish the final results of that review until January 10, 1985—about a month after the ITC published its final determination herein. The final margin calculation for the covered Boewe imports was 30.05 percent. 50 Fed. Reg. 1256. *See American Permac, Inc. v. United States,* ——CIT——, Slip Op. 86–83 (Aug. 12, 1986). It is clear from the record below that the Commission was aware of the approximate final margin calculations the ITA intended to publish.

On August 8, 1985, the ITA published the final results of the second periodic review. In that determination, the agency found weighted average margins of 17.23 percent for Boewe entries between July 1980 and October 1981, and 0.45 percent for Boewe entries thereafter through October 1982. 50 Fed. Reg. 32154. The ITA has since initiated periodic reviews covering Boewe entries from November 1982 through October 1984 (51 Fed. Reg. 5219), and from November 1984 through October 1985 (50 Fed. Reg. 50933). The preliminary margin determination for Boewe entries during the latter period is 1.87%. 51 Fed. Reg. 32676, 77 (September 15, 1986).

The Commission then examined the domestic industry, which it found to be weak and vulnerable to dumped imports from West Germany. Because of their current low profitability, the Commission found it unlikely that domestic producers of drycleaning machinery could reduce their prices to meet increased competition from West German imports stemming from revocation of the antidumping order. The Commission concluded, therefore, that revocation of the antidumping order would materially injure the domestic industry. *Id.* at 11–13.

DISCUSSION

At the outset, the Court must voice concern over the failure of the ITA to perform periodic margin calculations in the timely manner contemplated under 19 U.S.C. § 1675(a), which seriously impeded the efforts of both the Commission and the plaintiffs in the proceedings below. Congress enacted the antidumping law with the clear expectation—expressed repeatedly in the legislative history—that the ITA would render its determinations in *strict* adherence with statutory deadlines, not only to ensure that the remedial purpose of the antidumping law is achieved, but also to enable the ITC during injury investigations to make appropriate use of the ITA's findings. The ITA's failure to perform even remotely current margin calculations left the ITC essentially in the dark about whether, and to what extent, West German imports were dumped during the period under investigation. Such margin calculations, although highly relevant to the Commission's inquiry,[5] are peculiarly within the authority and expertise of the Commerce Department. The court cannot fault the Commission for reaching its determination as early as it did;[6] nor can the court say—at least in view of the findings upon which the Commission based its determination, discussed below—that the unavailability of current dumping margins rendered the determination unlawful or unsupported by substantial evidence. Nonetheless, it cannot be gainsaid that Commerce's protracted delays in conducting administrative reviews constitutes a serious breakdown in the administration of the antidumping law.

That being said, the Court now turns to the merits of plaintiffs' claim. Plaintiffs seek reversal of the ITC's determination on the basis that it is unsupported by substantial evidence on the record. They challenge the Commission's underlying findings as to both the

[5] Both the majority opinion and the dissent of Vice Chairman Liebeler describe the section 751(b) injury inquiry as proceeding from the assumption that any dumping by foreign producers is being offset by the existing order. USITC Pub. 1617 at 5, 17. The Commission could not properly make that assumption in this case because the order under review was not expeditiously administered by Commerce. As Chairwoman Stern and Commissioner Rohr observe, since the ITA failed to calculate final dumping margins or update deposit rates "it cannot be said that any injury relating to dumping has been offset in a relatively timely manner." *Id.* at 5 n. 10. The commissioners remarked that this fact and the fact that the only margin information supplied by Commerce covered sales prior to the introduction of Boewe's "flex" machines rendered it "virtually impossible for the Commission to apply its traditional analysis to the facts of this case." *Id.*

[6] *See* 19 C.F.R. § 207.45(2)–(3) (1984) (timetable for section 751(b) reviews by ITC). Also of some relevance is the following language from the House Conference Report to the Trade and Tariff Act of 1984:

> In section 751 review investigations, * * * [t]he Commission, for its part, has the duty to conduct a thorough investigation *within the context of the strict time constraints of the dumping and countervailing duty law* and to seek the information necessary for a reasoned determination.

H.R. Rep. No. 1156, 98th Cong., 2d Sess. 182 (1984) (emphasis added).

likely effects of revocation of the antidumping order on imports, and the impact of those imports on the domestic industry.

The Federal Circuit has stressed that the judicial review of a Commission determination for substantial evidence is a "limited standard of review", *Matsushita Electric Industrial Co., Ltd.* v. *United States*, 750 F.2d 927, 936 (Fed. Cir. 1984), and the limited parameters of that standard have been elucidated in numerous decisions. *E.g., Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1560 (Fed. Cir. 1984); *Phillip Bros. Inc.* v. *United States*, Slip Op. 86–74, 11 CIT —— (July 17, 1986); *American Spring Wire Corp.* v. *United States*, 8 CIT ——, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom., Armco Inc.* v. *United States*, 760 F.2d 249 (Fed. Cir. 1985).

With regard to the likely effects of revocation on imports, plaintiffs first complain that the ITC ignored, or gave insufficient weight, to the testimony of plaintiffs' managing officers at the public hearing on October 31, 1984, to show that removal of the antidumping order would not alter plaintiffs' volume or pricing decisions. Plaintiffs contend that their presentation of such direct testimony distinguishes this case from *Matsushita Electric Industrial Co., Ltd.* v. *United States, supra* in which the Federal Circuit sustained an ITC review determination that revocation of an antidumping finding covering Japanese television sets would materially injure the domestic industry. Plaintiffs emphasize the following language from the decision:

> Since the importers chose not to provide any direct evidence on their intent, the Commission had no choice but to rely on circumstantial evidence from which to infer likely intent, namely, production capacity, domestic and foreign demand, and incentives of motivations to increase imports.

750 F.2d at 934.

While the Court of Appeals in *Matsushita* found the absence of direct testimony concerning future intentions to be a salient shortcoming in the petitioners' presentation before the ITC, the court did not purport or have occasion to hold that the ITC must accept such testimony, when it is offered, over other forms of proof. To the contrary, the above quoted sentence, listing circumstantial factors of the sort relied upon by the Commission in that case and herein to infer likely intent, is immediately followed by the observation that "[s]uch factors are always relevant and, indeed, may be more reliable than self-serving declarations." *Id. See also id.* at 937 (additional views of Nichols, J.) (direct testimony of intent may constitute prima facie case "if believed and not controverted"). Thus, *Matsushita* does not limit the ITC's authority to weigh all evidence (direct and circumstantial) relevant to likely intent, and to reject the testimony of representatives of importing interests when warranted.

Although the Commission's findings regarding the effects of revocation of the antidumping order on the volume and pricing deci-

sions of West German producers are not unassailable, the Court cannot say they are unsupported by substantial evidence.

The Commission first found that West German producers intended to increase the volume of exports to the United States over present levels. This finding was amply supported in the record. In testimony at the Commission hearing, Mr. Boden acknowledged that a key reason for Boewe's development of the "flex" machine was, in essence, to increase sales in the American market (P. Doc. 25 at 16–17), and in fact Boewe exports to the United States increased significantly in 1983 and again in the first half of 1984. C. Doc. 64 at A–41. Furthermore, Boden projected that within the next few years Boewe would "supply flex machines up to our full practical capacity of about 350 to 400 units annually because the U.S. market for drycleaning machines is currently very strong and we expect this to continue." P. Doc. 25 at 18. This projection is higher than projections of 1985 imports given in questionnaire responses by Boewe et al. (C. Doc. 13 at 10; C. Doc. 25 at 17) and is significantly higher than import levels during 1983 and 1984. Likewise, Seco exports to the United States increased significantly during 1983 and the fist half of 1984 over prior levels (C. Doc. 64 at A–41), and no information was provided that such exports would either decrease in number or level off. *See* C. Doc. 14 at 10; C. Doc. 22 at 30.

The Commission also found the existence of price competition between the West German imports and certain domestic machines, and determined that such competition would sharpen upon revocation of the antidumping order due to the greater price flexibility permitted to West German producers. Evidence supporting the finding of price competition included Mr. Boden's testimony at the public hearing, from which the Commission could reasonably infer that one of Boewe's goals in developing the "flex" machines was greater price competitiveness.[7] Furthermore, the Commission's price comparisons of similar capacity drycleaning machines revealed that although average prices of domestically produced machines were below those of West German imports, the West German machines were priced comparably to, and occasionally lower than, models of certain U.S. manufacturers. C. Doc. 64 at Table 21. In addition, a telephone survey of major distributors indicated that the West German imports are considered price competitive with machines of certain U.S. manufacturers. C. Doc. 58. This evidence is sufficient to sustain the ITC's finding of price competition, notwithstanding evidence in the record tending to show the importance of certain nonprice factors.

[7] Mr. Boden stated:

> We sent a team to the United States for one month. We concluded that the machines originally developed * * * basically for the German and Austrian markets and which happened to appeal to certain other markets * * * were not of sufficiently high general appeal in the United States to justify the substantial price premia which had to be charged for their many highly engineered and sophisticated features * * *. The result of all this was the introduction of a completely new line of machines in the United States which we called the Permac "Flexible" machines.

P. Doc. 25 at 17.

The Commission stated that revocation of the antidumping order would "permit the petitioners much greater flexibility in determing prices", which "would derive from (1) the elimination of petitioners' current expenses resulting from the way the dumping order is presently being administered, and (2) the removal of any exposure to potential dumping duties." USITC Pub. 1617 at 10. The ITC based this finding, in part, on the required presumption that less-than-fair-value sales would continue or resume if the antidumping order were removed. Plaintiffs label this the "*Matsushita* presumption" because this Court discussed it with approval in *Matsushita Electric Industrial Co., Ltd.* v. *United States*, 6 CIT 25, 27, 569 F. Supp. 853, 856 (1983), *rev'd on other grounds*, 750 F.2d 927 (Fed. Cir. 1984). Plaintiffs do not challenge the presumption *per se* but apparently view it as rebuttable. The Court disagrees. The antidumping law reserves to the Commerce Department (the "administering authority") questions pertaining to whether and to what extent merchandise is being dumped, and—in 751(b) reviews—whether dumping is likely to continue or resume if a dumping order is revoked. Plaintiffs ask the ITC to revoke the dumping order on precisely the basis that is foreclosed to it—namely, a finding that West German imports are not currently dumped and would not be dumped if the order were revoked. As this Court stated in *Matsushita*:

> In order to give meaning to the separation of function which runs throughout the law, the ITC must presume that future sales will be at less than fair value if the ITA has not reviewed the matter.

Id.[8]

In the challenged determination, the ITC faced special difficulties in applying the *Matsushita* presumption due to the fact that it had no reasonably current margin calculations from Commerce. Thus, in reaching its finding that revocation would permit greater import pricing flexibility, the ITC properly left open questions of whether and to what extent recent West German imports were being dumped, and applied the *Matsushita* presumption in a general, open-ended manner.[9] The Commission did not blindly carry forward the stale margin data from Commerce. Conversely, it did not necessarily reject plaintiffs' declarations that their current prices were

[8] Plaintiffs point out that the ITA's delays in conducting Section 751(a) periodic reviews left them with no choice but to seek Section 751(b) review from the Commission. A Commerce Department regulation, 19 C.F.R. § 353.54(b), generally permits Section 751(b) review by the ITA only if the moving party demonstrates the absence of sales at less than fair value for at least a two-year period. Plaintiffs complain that they could not make this showing when they filed their review request with the ITC because at the time the ITA had not completed any periodic reviews. Although in its second periodic review, published August 1986, the ITA found only *de minimis* margins (0.45 %) for Boewe entries between November 1981 and October 1982 (50 Fed. Reg. 32154, 32156), the agency has yet to publish any final review results for subsequent periods. *See* note 4.

The ITA's backlog in conducting periodic reviews, though lamentable, does not render the Commission competent or authorized to speculate about matters such as whether certain imports have been or are being dumped, or whether dumping is likely to continue or resume if an order is revoked.

[9] The majority stated:

> Our efforts to predict possible price changes for the imported machines that would result from revocation of the order are complicated by the fact that the Department of Commerce has not calculated final dumping margins since 1974, and the only available preliminary margins (65.95 percent for Bowe) are three-years old. These margins antedate the introduction of the "flexible" machines. We expect that the petitioner has made some allowance in pricing for possible duties, but the extent of that allowance under these circumstances cannot be assessed.
>
> USCIT Pub. 1617 at 10 n. 38.

set to avoid dumping margins; but even if that were the case the Commission would be required to assume that some degree of dumping would resume if the antidumping order were revoked. *See Matsushita*, 569 F. Supp. at 856 n. 7. In any event, the Commission evidently chose not to believe plaintiffs' declarations that revocation of the order would have no effect on their pricing decisions. As discussed above, substantial evidence supports the Commission's findings that West German imports are price competitive with certain American-built machines and that plaintiffs intend to increase the volume of imports. In view of those findings, the Commission's rejection of plaintiff's testimony was not unreasonable.

Lastly, plaintiffs challenge the Commission's finding that the domestic industry is weak and vulnerable. Commission data revealed that although domestic consumption increased during the period under investigation (C. Doc. 64 at Table 3), the domestic industry did not participate significantly in the consumption increase. During much of the period between 1981 and 1984, most American producers experienced extremely low profitability and low capacity utilization. *Id.* at Tables 6, 11, 12. For the period from 1981 through 1983, production and shipments by American producers, both for domestic consumption and for export, declined substantially. *Id.* at Tables 4, 5, 7, 8. During the same period employment by those producers declined sharply, in terms of hours worked, wages paid, and total compensation. *Id.* at Table 10. Although there was growth in some indicators during the first half of 1984, this was not sufficient to overcome setbacks suffered during previous periods. *Id.* at Tables 4–12. The Commission also noted that "the domestic industry is made even more vulnerable to the impact of imports from the [Federal Republic of Germany] because it faces severe competition from imports from Italy".[10] USITC Pub. 1617 at 13 n. 51. This evidence, considered as a whole, is substantial and supports the Commission's finding that the domestic industry is weak and vulnerable.

Plaintiffs contend that the Commission should have drawn adverse inferences against the domestic industry for failing to participate as parties in the investigation. As Chairwoman Stern observed, any nonparticipation by domestic producers did not reflect lack of interest in the outcome. *Id.* at 13 n. 52. Most producers responded in full to the ITC's lengthy questionnaire, and those producers who most directly competed with West German companies voiced particular concern. Under the circumstances, the Commission properly declined to penalize the domestic industry for not taking party status.

---

[10] Plaintiffs argue that the ITC's treatment of evidence regarding competition by Italian imports was unlawful. The ITC properly refused to weigh causes of injury. As the House Ways and Means Committee Report on the Trade Agreements Act of 1979 emphasized:

> Any such requirement has the undesirable result of making relief more difficult to obtain for those industries facing difficulties from a variety of sources, precisely those industries that are most vulnerable to subsidized or dumped imports.

H.R. Rep. 317, 96th Cong., 1st Sess. 47 (1979).

The Commission concluded that material injury would result from revocation of the antidumping order. This conclusion was reasonably based on the Commission's subsidiary findings, which the court has reviewed and found to be supported by substantial evidence.

The court holds that the Commission's determination is supported by substantial evidence and is in accordance with law. Accordingly, it is ORDERED that plaintiffs' motion for judgement upon the agency record is denied and the action is dismissed.

(Slip Op. 86–121)

J.C. PENNEY PURCHASING CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 81–12–01631 (See attached Schedule A)

Before DICARLO, *Judge.*

Plaintiff challenges classification of merchandise invoiced as "electronic cash register, calculator" and "electronic cash register", contending that it is not properly classifiable as toys, not specially provided for * * * other, under item 737.95 of the Tariff Schedules of the United States (TSUS). Plaintiff argues that the merchandise is not chiefly used for the amusement of children because it has practical and educational utility as a calculator and that any amusement it engenders is not of the same type required for classification as a toy within the meaning of the TSUS.

Held: The merchandise is chiefly used for the amusement of children and is properly classified as a toy under item 737.95, TSUS. It is not chiefly used as a calculator or for educational purposes. The amusement children experience from its use is of the same type intended for articles classified as a toy within the meaning of the TSUS.

[Judgment for defendant.]

(Decided November 25, 1986)

Frank W. Schattschneider for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Susan Handler-Menahem*) for defendant.

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of small, plastic replicas of cash registers incorporating a battery-operated calculator, invoiced as "electronic cash register, calculator" and "electronic cash register." Customs classified the articles either under item 737.95, Tariff Schedules of the United States (TSUS) as toys, not specially provided for * * * other or under item 676.20, TSUS, as calculating machines specially constructed for multiplying and dividing. Defendant asserts that the classification of some of the merchandise under item 676.20, TSUS was erroneous and that all the articles should be classified as toys under item 737.95, TSUS.

Plaintiff contends that the merchandise is not a toy because it is not chiefly used for the amusement of children since it is reasonably capable of use for some practical purpose other than amusement

and does not provide the type of amusement required for classification as a toy within the meaning of the TSUS. Plaintiff offers, in order of preference, three alternative classifications.

Initially, the Court notes that item 737.95, TSUS is in schedule 7, part 5, subpart E of the TSUS. Headnote 1 of subpart E provides that "[t]he articles described in the provisions of this subpart (except parts) shall be classified in such provisions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules, * * *." The term "toy" is defined in headnote 2 of subpart E as "any article chiefly used for the amusement of children or adults."

Plaintiff argues, however, that if the merchandise is shown to have uses other than for the amusement of children or adults, it can not be classified as a toy. Plaintiff relies upon *Illfelder* v. *United States*, 1 Ct. Cust. App. 109, 111, T.D. 31115 (1910) where the court defined a toy as "something which is intended and designed for the amusement of children only, and which by its very nature and character is *reasonably* fitted for no other purpose." (Emphasis in original).

Plaintiff's reliance upon the *Illfelder* test is misplaced. The court in *Illfelder* created a definition for the term "toy" because no definition was provided in paragraph 418 of the Tariff Act of 1897. Later courts continued to rely upon the *Illfelder* test in the absence of a statutory definition. *See, e.g., United States* v. *Meier & Frank Co.*, 5 CCPA 208, T.D. 34330 (1914).

With passage of the Tariff Act of 1930, courts abandoned the *Illfelder* test because paragraph 1513 of that Act provided a controlling statutory definition. *See United States* v. *Louis Wolf & Co.*, 26 CCPA 243, 248–49, C.A.D. 23 (1938); *Skoja Manufacturing Co.* v. *United States*, 33 Cust. Ct. 359, 361, Abs. 58387 (1954); *A. Ponnock & Sons* v. *United States*, 51 Cust. Ct. 196, 198, Abs. 67972 (1963); *S. Rosenberg Christmas Corp.* v. *United States*, 51 Cust. Ct. 283, 285, Abs. 68170 (1963).

The court in *Poynter Products, Inc.* v. *United States*, 64 Cust. Ct. 293, 298, C.D. 3993 (1970) held the reasoning of the *Skoja* court to be equally applicable to the TSUS. According to the court, the *Illfelder* test "—to the extent that it defines a toy as something which is intended for the amusement of children only, and is reasonably fitted for no other purpose—has been superseded by the statutory definition of a toy—in both the Tariff Act of 1930 and the tariff schedules—as an article chiefly used for the amusement of children." (Footnote omitted). *Poynter Products*, 64 Cust. Ct. at 298.

The question before the Court is whether the merchandise is chiefly used for the amusement of children or adults making it a toy for purposes of the TSUS. Chief use is statutorily defined as "the use which exceeds all other uses (if any) combined." General Interpretative Headnote 10(e)(i).

Plaintiff relying on the *Illfelder* test offered evidence that the merchandise might have a reasonable use other than as a toy. Having rejected the *Illfelder* test, the Court weighs this evidence of possible alternative uses only in making its determination of how the merchandise is chiefly used.

Plaintiff's first witness testified that, although the merchandise could be used as a calculator if necessary, he would not purchase it if in the market for a "normal" calculator. The Court finds that the cash register design of the merchandise makes it an unreasonable, impractible substitute for a calculator.

Plaintiff also called as witnesses two teachers to support its contention that the merchandise serves the practical purpose of educating children. These witnesses used the merchandise in their classrooms approximately five years after entry at the behest of plaintiff's attorney. Both witnesses used the merchandise in northern New Jersey on an experimental basis with a very limited number of children.

No evidence was offered that the subject merchandise was being used in schools as a teaching tool at the time of importation or that the articles were imported for this purpose. Defendant's witness testified, on the other hand, that the merchandise would not function effectively as a teaching tool for children of the ages prescribed by plaintiff because its calculating function was not self-correcting, and children would not know if what they calculated was correct.

The Court considers the merchandise itself. It is accepted that representative samples of the merchandise are potent witnesses. *See, e.g., United States* v. *Halle Bros. Co.*, 20 CCPA 219, 221, T.D. 45995 (1932). In the present action, the testimony as to actual use is limited such that the sample is instrumental in finding the primary use of the merchandise. *See Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, 223, C.D. 4433 (1973) (finding that "even where testimony as to actual use is very limited, the character and design of the sample itself may compel a finding as to the primary use of the merchandise," citing *Leaf Brands, Inc.* v. *United States*, 70 Cust. Ct. 66, C.D. 4409 (1973)).

The Court finds the samples offered to be small, plastic replicas of cash registers designed for children to use in play. To make the merchandise more inviting for play, these particular samples make noises when the "cash drawer" opens or the buttons on the built-in calculator are pushed.

The "cash-drawer" itself is not large enough to accommodate real paper money, so play paper money and plastic coins in various denominations are provided. The paper money has "Bank of Imco toy," "toy note" and "play money" printed on it, and the coins are made of silver colored plastic with "play money" stamped on them. A manually operated register tape provides the child another part to manipulate, but since it lacks any printing mechanism no transactions are recorded onto the tape.

The Court also considers the manner in which the merchandise is sold. While not determinative, it is accepted that "the marketing of an imported article is relevant in determining the proper classification of that item for tariff purposes." *See, e.g., Lukas American, Inc.* v. *United States*, 7 CIT 280, 282 (1984).

Plaintiff purchased the merchandise from a manufacturer of toy products and sold it in its stores in the toy departments. The articles were not sold by plaintiff in any retail outlet that did not have a toy department. One of the samples contains a "pulling label" from plaintiff's catalog center that refers to the merchandise as a "toy cash register." In its sales catalog, plaintiff listed the merchandise in a special "Toy Index" which has "obvious probative value" as to its proper classification. *See Montgomery Ward & Co.* v. *United States*, 62 Cust. Ct. 718, 724, C.D. 3853 (1969).

After weighing the evidence, the Court finds that the merchandise is chiefly used for the amusement of children and thus is a toy. The Court finds that the merchandise is not chiefly used as a calculator. Also, unlike in *Childcraft Education Corp.* v. *United States*, 742 F.2d 1413 (Fed. Cir. 1984), the Court is not persuaded that the merchandise is chiefly used for educational purposes.

Finally, plaintiff argues that the merchandise is not a toy because the amusement it engenders, if any, is not true amusement similar to that which a child receives when playing with a ball or top. According to plaintiff, the amusement intended by Congress when describing a toy in the TSUS is the merriment or jollity obtained from an article which is essentially a plaything. Plaintiff attempts to align its merchandise with that discussed in cases which found a different type of amusement experienced by children using certain items such as *Louis Wolf*, 26 CCPA at 243 (involving a microscope set); *Western Stamping Corp.* v. *United States*, 61 Cust. Ct. 152, 289 F. Supp. 1016 (1968), *aff'd* 57 CCPA 6, 417 F.2d 316 (1969) (involving a typewriter); *F.F.G. Harper Co.* v. *United States*, T.D. 46423, 63 Treas. Dec. 948 (1933) (involving model parts of miniature steam engines).

Unlike the articles described in these cases, the Court finds that the subject merchandise does provide a type of amusement to a child similar to that received from an article which is essentially a plaything. The merchandise is designed to be used by young children "playing store" and the noises which accompany its use provide merriment. Such amusement is different than that experienced by children examining objects with a working microscope, typing letters on a functional typewriter or building models of miniature steam engines.

The Court concludes that the merchandise is chiefly used for the amusement of children and is properly classified as a toy under item 737.95, TSUS. Judgment will be entered accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/191	Tsoucalas J. November 5, 1986	Wieland America, Inc.	86-1-00020	Item 657.30 8.2%	Item 661.68 4.9%	Agreed statement of facts	Boston "Finned GEWA tubes-D"
C86/192	Newman, J, November 7, 1986	Bourns, Inc.	80-9-01552	Item 686.10 6% with no allowance under item 807.00 for cost or value of subject metal contacts	Allowance under item 807.00 for cost or value of said metal and ceramic contacts	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d, 930 (1983)	San Diego Metal and ceramic contacts in potentiometers, of U.S. origin
C86/193	Newman, J. November 7, 1986	Bourns Trimpot	81-4-00385, etc.	Item 686.10 6% with no allowance under item 807.00 for cost or value of subject metal contacts	Allowance under item 807.00 for cost or value of said metal and ceramic contacts	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Metal and ceramic contacts in potentiometers, of U.S. origin
C86/194	Newman, J. November 7, 1986	Bourns, Inc.	82-7-00976	Item 686.10 6% with no allowance under item 807.00 for cost or value of subject metal contacts	Allowance under item 807.00 for cost or value of said metal and ceramic contacts	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Metal and ceramic contacts in potentiometers of U.S. origin
C86/195	Tsoucalas, J. November 7, 1986	L. H. Research, Inc.	85-8-01104	Item 682.60 4.7%	Item A682.60 Free of duty	Agreed statement of facts	Los Angeles Power supplies

C86/196	Carman, J. November 10, 1986	Bulova Watch Co.	84-10-01443	Item 688.45 4.9% for electronic watches Item 682.95 7.3% for batteries	Item 806.20 with duty owing on value repairs only	Agreed statement of facts	New York Electronic watches and batteries
C86/197	Newman, J. November 13, 1986	Bourns, Inc.	80-9-01555, etc.	Item 686.10 6% with no allowance under item 807.00 for cost or value of subject metal contacts	Allowance under item 807.00 for cost or value of said metal and ceramic contacts	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d, 930 (1930)	San Diego Metal and ceramic contacts in potentiometers of U.S. origin
C86/198	Newman, J. November 13, 1986	Sigma Instruments, Inc.	80-6-00906	Item 685.90 8.5% with no allowance under item 807.00 for cost or value of subject metal terminal pins	Allowance under item 807.00 for cost or value of said metal and ceramic contacts	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd* 724 F.2d 930 (1930)	San Diego Metal terminal pins of U.S. origin

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/268	DiCarlo, J. November 5, 1986	Mitsubishi International Corp.	82-6-00830-S, etc.	American selling price	Appraised value less 22%, per pair	Agreed statement of facts	Houston Footwear
V86/269	DiCarlo, J. November 6, 1986	Carlyle Footwear	80-5-00820	American selling price	Appraised value less 22%, per pair	Agreed statement of facts	New York Footwear
V86/270	Tsoucalas, J. November 6, 1986	Sandvik Process Systems, Inc.	85-3-00447	Transaction value	Invoice price thereof, exclusive of any additions for inland freight and related charges incident to the transportation of the merchandise from point of sale to the port of exportation	Sandvik, Inc. v. U.S., Abs. R85/477	New York Steel products
V86/271	Tsoucalas, J. November 6, 1986	Sandvik, Inc.	85-3-00453	Transaction value	Invoice price thereof, exclusive of any additions for inland freight and related charges incident to the transportation of the merchandise from point of sale to port of exportation	Sandvik, Inc. v. U.S., Abs. R85/477	New York Steel products
V86/272	Rao, J. November 7, 1986	Singer Co.	83-3-00407	Export value	Appraised values shown on entry papers less 28.5%	Hensel, Bruckmann & Lorbacher, Inc.	Nashville Industrial sewing machine needles
V86/273	Watson, J. November 7, 1986	Texas Instruments, Inc.	82-5-00685	Constructed value	Said value is 40.239% of entered value	Agreed statement of facts	Houston Semiconductor devices

V86/274	Tsoucalas, J. November 10, 1986	Sandvik, Inc.	85-1-00130	Transaction value	Invoice price thereof, exclusive of any additions for inland freight and related charges incident to the transportation of the merchandise from point of sale to port of exportation.	Sandvik v. U.S., Abs. R85/477	New York Steel products

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Treasury Decisions

(T.D. 86-206)

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Greece Drachma	
November 3, 1986	$.007143
November 4, 1986	.007156
November 5, 1986	.007105
November 6, 1986	.007117
November 7, 1986	.007123
Israel Shekel:	
November 3–7, 1986	N/A
South Korea Won:	
November 3, 1986	.001140
November 4, 1986	.001139
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Taiwan N.T. Dollar:	
November 3, 1986	.027375
November 4, 1986	.027382
November 5, 1986	.027390
November 6, 1986	.027397
November 7, 1986	N/A

(LIQ-03-01 S:COM CIE)

Dated: November 7, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-207)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

November 11, 1986: Holiday.

Greece Drachma:	
November 10, 1986	$.007163
November 12, 1986	.007225
November 13, 1986	.007212
November 14, 1986	.007231
Israel Shekel:	
November 10–14	N/A
South Korea Won:	
November 10, 1986	.001142
November 12, 1986	.001146
November 13–14, 1986	.001147
Taiwan N.T. Dollar:	
November 10, 1986	N/A
November 12, 1986	.027427
November 13, 1986	.027435
November 14, 1986	.027442

(LIQ-03-01 S:COM CIE)

Dated: November 14, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-208)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece Drachma:	
November 17, 1986	$.007215
November 18, 1986	.007207
November 19, 1986	.007212
November 20, 1986	.007210
November 21, 1986	.007174
Israel Shekel:	
November 17-21, 1986	N/A
South Korea Won:	
November 17-18, 1986	.001147
November 19, 1986	.001146
November 20, 1986	.001147
November 21, 1986	.001146
Taiwan N.T. Dollar:	
November 17, 1986	.027457
November 18, 1986	.027465
November 19, 1986	.027473
November 20, 1986	.027480
November 21, 1986	.027488

(LIQ-03-01 S:COM CIE)

Dated: November 21, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-209)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below.

The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

November 27, 1986: Holiday.

Greece Drachma:	
November 24, 1986	$.007156
November 25, 1986	.007239
November 26, 1986	.007244
November 28, 1986	.007262
Israel Shekel:	
November 24–28, 1986	N/A
South Korea Won:	
November 24, 1986	.001146
November 25, 1986	.001146
November 26, 1986	.001147
November 28, 1986	.001149
Taiwan N.T. Dollar:	
November 24, 1986	.027503
November 25, 1986	.027510
November 26, 1986	.027518
November 28, 1986	N/A

(LIQ–03–01 S:COM CIE)

Dated: November 28, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86–210)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Japan Yen:	
November 3, 1986	$.006098
November 4, 1986	.006101
November 5, 1986	.006079
November 6, 1986	.006124
November 7, 1986	.006127

(LIQ-03-01 S:COM CIE)

Dated: November 7, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-211)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

November 11, 1986: Holiday.

Japan Yen:	
November 10, 1986	$.006141
New Zealand Dollar:	
November 10, 1986	.51700
November 12, 1986	.51800
November 13-14, 1986	.51650

(LIQ-03-01 S:COM CIE)

Dated: November 14, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-212)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Japan Yen:	
November 17, 1986	$.006142
November 18, 1986	.006143
November 19, 1986	.006158
November 20, 1986	.006144
November 21, 1986	.006096
New Zealand Dollar:	
November 17, 1986	.51350
November 18, 1986	.51450
November 19, 1986	.51680
November 20, 1986	.51850
November 21, 1986	.51780

(LIQ-03-01 S:COM CIE)

Dated: November 21, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-213)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs

purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

November 27, 1986: Holiday.

Japan Yen:	
November 24, 1986	$.006091
November 25, 1986	.006152
November 26, 1986	.006137
New Zealand Dollar:	
November 24, 1986	.51750
November 25, 1986	.52000
November 26, 1986	.52080

(LIQ-03-01 S:COM CIE)

Dated: November 28, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-214)

APPROVAL OF AMERICAN INSPECTION AND TESTING, INC., TO GAUGE IMPORTED PETROLEUM AND PETROLEUM PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), American Inspection and Testing, Inc., 212 East X Street, Deer Park, Texas 77536, has applied to Customs for approval to gauge imported petroleum and petroleum products. It has been determined that American Inspection and Testing meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of American Inspection and Testing, Inc., to gauge imported petroleum and petroleum products in all Customs districts is approved.

EFFECTIVE DATE: December 8, 1986

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: December 8, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

[Published in the Federal Register, December 15, 1986 (51 FR 44967)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 171

PROPOSED CUSTOMS REGULATIONS AMENDMENT RELATING TO THE DEFINITION OF FRAUD UNDER 19 U.S.C. 1592

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by revising the definition of "fraud" in the revised penalty guidelines for violations of 19 U.S.C. 1592, to remove the requirement that the violation be deliberately done with intent to violate the laws of the U.S. The amendment would enhance the enforcement of § 1592 fraud cases.

DATE: Comments must be received on or before February 9, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Sandra L. Gethers, Entry Procedures and Penalties Division (202–566–8317).

SUPPLEMENTARY INFORMATION:

Background

Appendix B to Part 171, Customs Regulations (19 CFR Part 171, Appendix B), sets forth the revised penalty guidelines for violations of title 19, United States Code, section 1592. Section 1592 imposes monetary penalties and other sanctions for entering, introducing, or attempting to enter or introduce any merchandise into the commerce of the U.S. by means of any document, written or oral statement, or act which is material and false, or any omission which is material. The revised guidelines provide for, among other things, mitigation of the monetary penalty according to the degree of culpability involved in the violation of § 1592.

There are three degrees of culpability under § 1592: negligence, gross negligence and fraud. Under the current definition of fraud, as set forth in § (B)(3) of the revised penalty guidelines in Appendix B to Part 171, Customs Regulations, a fraudulent violation of § 1592 is one that results from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the U.S., as established by clear and convincing evidence.

Customs believes that this definition of fraud imposes a burden of proof that is greater than is necessary for establishing civil fraud under § 1592. It should be sufficient to prove that the acts (including false statements) were "knowingly" committed or made, without the additional burden of proving that the violator knew that the direct consequences of its action would be loss of duties to the Government or violation of any of its laws. Also, to require evidence that the acts constituting a § 1592 violation were deliberately done with the intent to defraud the revenue or otherwise violate U.S. laws in order to establish fraud, could impair the enforcement of § 1592 fraud cases.

PROPOSED ACTION

Accordingly, it is proposed that the definition of fraud in § (B)(3) of Appendix B to Part 171, Customs Regulations, be amended. The new definition would require, in order to establish fraud, evidence that the false statement or act in connection with the transaction was committed (or omitted) knowingly, i.e., voluntarily and intentionally, and not because of mistake or accident or other innocent reason, as established by clear and convincing evidence.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 171

Customs duties and inspection, Penalties, Seizures and forfeitures.

PROPOSED AMENDMENT

It is proposed to amend Appendix B to Part 171, Customs Regulations (19 CFR Part 171, Appendix B), by removing the text of subparagraph (B)(3) and inserting a new text, to read as follows:

APPENDIX B TO PART 171—CUSTOMS REGULATIONS, REVISED PENALTY GUIDELINES, 19 U.S.C. 1592

* * * * * * *

(B) *Degrees of Culpability*

* * * * * * *

(3) *Fraud.* A violation is determined to be fraudulent if the material false statement or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, and not because of mistake or accident or other innocent reason, as established by clear and convincing evidence.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 26, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 10, 1986 (51 FR 44483)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85–1163)

SURFACE TECHNOLOGY, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE *v.* ELEKTROSCHMELZWERK KEMPTEN GMBH, ET AL., AND W. SCHLAFHORST & CO., ET AL., INTERVENORS

Kenneth J. Burchfiel, Sughrue, Mion, Zinn, Macpeak & Seas, of Washington, D.C., argued for appellant. On the brief for appellant were *Sheldon I. Landsman* and *Thomas J. Macpeak*, P.C., of Sughrue, Mion, Zinn, Macpeak & Seas and *Italo H. Ablondi*, *F. David Foster* and *Sturgis M. Sobin*, of Ablondi & Foster, P.C., of Washington, D.C.

Judith M. Czako, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee ITC. With her on the brief were *Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

Donald D. Evenson, Barnes & Thornburg, of Washington, D.C., argued for intervenor W. Schlafhorst & Co. With him on the brief was *Ryan M. Fountain*. Also on the brief were *Dalbert U. Shefte*, of Richards, Shefte & Pinckney, of Charlotte, North Carolina and *Donald E. Knebel*, Barnes & Thornburg, of Indianapolis, Indiana.

Herbert I. Cantor, Cantor & Lessler, of Bethesda, Maryland, argued for intervenor Elektroschmelzwerk Kempten GmbH. Also on the brief were *Milton J. Wayne* and *Richard M. Goldberg*, Burgess, Ryan & Wayne, of New York, New York.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85–1163)

SURFACE TECHNOLOGY, INC., APPELLANT, *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE *v.* ELEKTROSCHMELZWERK KEMPTEN GMBH, ET AL., AND W. SCHLAFHORST & CO., ET AL., INTERVENORS

(Decided September 23, 1986)

Before SMITH, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

SMITH, *Circuit Judge*.

In this unfair competition case under 19 U.S.C. § 1337 (1982) (section 337), appellant, Surface Technology, Inc. (Surface), appeals from the determination of the United States International Trade Commission (Commission), that there was no violation of section 337 because, on this record, method claims 2, 12, 13, and 14 of U.S.

reissue patent 29,285 (the '285 patent) were invalid, and the remaining product claims were not infringed. We affirm.

THE CLAIMED INVENTION

The '285 patent, which is assigned to Surface, relates to a method of forming a composite structure on an article by electroless plating containing polycrystalline diamonds and product claims to the resulting coated articles.[1] There are 12 claims at issue, 8 product claims (claim 1, 3, 4, and 7–11) and 4 method claims (claims 2, 12, 13, and 14). Of the product and method claims only two, 7 and 12, do not specifically employ polycrystalline diamonds. In addition, all of the product claims require that the diamonds be secured within a metallic matrix by "substantial nucleation" or "nucleation bonding." "Nucleation bonding" is an expression coined by the inventors to describe the plating out of metal on the catalytic diamond surface itself as opposed to the encapsulating that occurs with other hard particles such as natural diamonds. Product claims, 7, 10, and 11, and method claims, 12 and 14, require the employment of a "strike layer." A "strike layer" is an initial layer of metal plated onto the article prior to the co-deposition of diamonds and metals.

BACKGROUND

The '285 patent is a reissue of U.S. patent No. 3,036,–577 (the '577 patent), which issued on February 3, 1976, and was assigned to E. I. du Pont de Nemours & Company (DuPont). The '577 patent issued with five product claims, all including the limitation "nucleation bonding" and one method claim. The method claim had been canceled during prosecution. There was no explanation as to why it was included in the issued patent. On June 7, 1976, the inventors filed for reissue of the '577 patent to close the gap that existed in the prosecution history. The reissue application specified that reissue should be allowed because of the "erroneously and inadvertently cancelled Claim 2, corresponding to Claim 5 as filed, and, even though Claim 2 was ultimately issued." A particle size limitation was added to claim 2 and, on June 28, 1977, the '285 patent issued and was assigned to DuPont.

DuPont pioneered the composite diamond coating (CDC) industry. In addition to the '285 patent, DuPont discussed the CDC process with Elektroschmelzwerk Kempten GmbH (ESK), a European dis-

[1] Claims 1 and 2 of the '285 patent, as set forth in the reexamination certificate, are representative of the claims in issue:

"1. A coated article formed by electroless plating comprising a co-deposited uniform dispersion of *polycrystalline* diamond particles secured by substantial nucleation within a metallic matrix comprising one of the group consisting of: (1) an alloy including a metal of the subgroup made up of nickel, cobalt and mixtures thereof with one of the elements phosphorus, boron and mixtures thereof and (2) elemental copper, deposited on a supporting substrate consisting of polymer, metal, ceramic or glass.

"2. A method of forming a composite structure on an article by electroless plating comprising immersing said article in a stable electroless bath having a composition effecting concurrent deposition of particulate *polycrystalline* diamond *having a particle size in the range of 0.1μ to 75μ* dispersed in a metallic matrix comprising one of the group consisting of (1) an alloy including a metal of the sub-group made up of nickel, cobalt and mixtures thereof with one of the elements phosphorus, boron and mixtures thereof and (2) elemental [elemental] copper, while maintaining agitation of said bath retaining said particulate diamond in suspension, and removing said article carrying said composite structure from said bath [when] *after* said composite structure has been plated out on said article in preselected amount." (In this quotation from the reexamination certificate, brackets indicate deletions and underlining indicates additions to be reflected in the amended patent.)

tributor of DuPont's patented synthetic polycrystalline diamonds. ESK declined DuPont's offer to sell its assets relating to the CDC business. In 1979, DuPont sold its CDC business to Surface and assigned it the related patents.

On December 3, 1981, ESK filed a request for reexamination of the '285 patent. In the reexamination proceeding, claims 1, 2, and 3 of the reissued '285 patent were amended to include the limitation "polycrystalline." Claims 4, 5, and 6 remained the same. New claims 7–14 were added with claims 7–12 directed to coated article products and claims 13 and 14 directed to a method for producing a composite structure.

On July 5, 1983, a reexamination certificate for the '285 patent, as amended, issued.

Proceedings Below

Surface filed a complaint with the Commission alleging violations by ESK, Barmer Barmag Maschinenfabrik A.G., FAG Kugelfischer Georg Schaefer & Co., Schubert & Salzer Maschinenfabrik A.G., and American Barmag Corporation (group I respondents) and W. Schlafhorst & Co. and American Schlafhorst Co., Inc. (group II respondents).[2] The Commission investigated Surface's allegations of (1) infringement of claims 1–4 and 7–14 of the '285 patent; (2) infringement of claim 1 of U.S. patent No. 3,904,512; and (3) unreasonable restraint of trade with respect to warranty services for the imported products.[3] In the initial determination issued May 29, 1984, the administrative law judge (ALJ) held there was no violation of section 337 in the importation and sale of the CDC textile machinery under investigation; method claims 2, 12, 13, and 14 were invalid as obvious under 35 U.S.C. § 103; the imported articles under investigation did not infringe the product claims, claims 1, 3, 4, and 7–11, of the '285 patent; and all other elements of a violation of section 337 existed.[4]

Surface filed a petition with the Commission for review of the ALJ's determinations regarding invalidity and infringement. The group I and group II respondents filed contingent petitions for review. The Commission determined to review the issue of validity of the method claims of the '285 patent and affirmed the ALJ's initial determination that claims 2 and 12–14 are invalid. The Commission determined not to review the remainder of the initial determination (including the determination of noninfringement), except that the Commission expressly took no position regarding the ALJ's determinations of validity of the product claims and the issue of prevention of the establishment of an industry. Those portions of the initial determination that the Commission did not review became the deter-

[2] The group I and group II respondents' motions to intervene were granted. *See Surface Technology, Inc. v. United States Int'l Trade Comm'n*, 780 F.2d 29, 30–31 (Fed. Cir. 1985).

[3] After the prehearing conference Surface's allegations (2) and (3) were withdrawn with prejudice.

[4] Although intervenors appeal the remaining elements of the section 337 violation, we will not review those portions of the initial determination on which the Commission has expressly taken no position. *Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423, 223 USPQ 193, 194–95 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2706 (1985).

mination of the Commission[5] with the exception of those issues upon which the Commission expressly took no position. Thus, the ALJ's determination of noninfringement became the determination of the Commission.

The Commission noted that the ALJ did not specifically discuss the question of the level of skill in the art. Surface argued that the failure to make a specific finding on this question was fatal to the conclusion of obviousness under 35 U.S.C. § 103. In view of Surface's contentions, the Commission examined the record and reached its own conclusion that, on this record, method claims 2, 12, 13, and 14 of the '285 patent were invalid as obvious under 35 U.S.C. § 103.

ISSUES

Two principal questions are raised on appeal:[6]

(1) whether substantial evidence supports the Commission's findings underpinning its conclusion that claims 2, 12, 13, and 14 of the '285 patent are invalid under 35 U.S.C. § 203; and

(2) whether substantial evidence supports the Commission's findings that claims 1, 3, 4, and 7–11 of the '285 patent are not infringed by certain CDC textile machinery components produced and/or sold by the group I and group II respondents.

VALIDITY

Surface contends that the Commission was not presented with prior art more pertinent than that presented to the United States Patent and Trademark Office; thus, the statutory presumption of validity of claims 2 and 12–14 was not rebutted. Surface argues that the ALJ's initial determination completely missed the point; that several findings were not supported by substantial evidence; and that the ALJ disregarded the findings of fact in support of its position.

Surface asserts that the claims of the '285 patent have been subject to close scrutiny by the United States Patent and Trademark Office three times and therefore the presumption of validity is especially strong. Surface's insistence that the claims of the '285 patent have been examined three times when applied to the method claims is flawed. In the initial prosecution of the '577 patent, the method claims were rejected. Specifically, the 35 U.S.C. § 103 rejection of amended claim 5 was maintained by the examiner until the claim was canceled by the applicant. Apparently, due to inadvertence by the United States Patent and Trademark Office, the method claim was printed in the issued '577 patent. A review of the reissue prosecution of the '285 patent shows that method claim 2 was amended to include a particle size range and the method claim was allowed without any additional prosecution of the claim.

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[5] 19 C.F.R. § 210.53(h) (1985). *See Beloit Corp.*, 742 F.2d at 1423, 223 USPQ at 194–95.

[6] In view of our decision as to issue 1, we do not need to reach the issue that claim 2 was not properly allowed under 35 U.S.C. § 251 during the reissue of the '285 patent.

The prosecution history of the reexamination proceeding of the '285 patent shows that method claim 2 was rejected as unpatentable under 35 U.S.C. § 103. In order to overcome the rejection of all of the claims, applicant submitted affidavits of Konrad Parker, Marshall B. Peterson, Arthur Hughes Graham, and Nathan Feldstein. The section 103 rejection of claim 2 was sustained and additional prior art references were cited. Additional affidavits were submitted by Nathan Feldstein and Frederick N. Hubbell. Again, the section 103 rejection was sustained. Following an interview with the examiner, claim 2 was amended to include the limitation "polycrystalline" and all pending claims were allowed with the examiner's caveat that the method claims were arguably somewhat broader in scope than the product claims.

With this rather tortuous and laborious prosecution history, the ALJ considered the prior references and additional testimony and affidavits before concluding that method claims 2 and 12–14 were invalid. The ALJ correctly acknowledged that the burden of proof is on the party asserting invalidity and that it must be carried by clear and convincing evidence. The fact that the basis for holding the method claims invalid did not include different or additional references is not dispositive. Although the prior art considered by the ALJ was essentially the same as that considered by the examiner, this alone is an insufficient basis for reversing the decision of the Commission. The issue before this court is not whether on appeal Surface can marshal the evidence of record to support its argument for validity, but rather whether substantial evidence in this record supports the factual determinations of the Commission underlying its legal conclusion of obviousness.[7]

A careful review of the prosecution history of the '285 patent results in the conclusion that the method claims were allowed based on affidavits submitted by Parker, Peterson, and Graham. Parker provided an affidavit, which was submitted in the reexamination proceeding, stating that the '285 patent disclosed "several meritorious inventions, * * * which would have been unobvious in view of the" prior art. During the proceeding before the Commission, the deposition of Mr. Parker was made of record. Surface states that Parker's testimony as "hired gun" for ESK was "contrary to his prior affidavit in the '285 prosecution and [Parker took] positions totally unsubstantiated by documents or other evidence." Surface proposes that the Commission should have followed "the USPTO final rulings on patentability and Parker's sworn affidavit" and not "adopted as *facts* the Examiner's abandoned positions on patentability and Parker's later 'hired' testimony." First, both Surface and ESK paid for Parker's opinion on patentability, albeit at different times. Second, it is difficult, if not impossible to determine which

[7] *See SSIH Equip. S.A. v. United States Int'l Trade Comm'n*, 718 F.2d 365, 371, 218 USPQ 678, 684 (Fed. Cir. 1983); *American Hosp. Supply Corp. v. Travenol Laboratories, Inc.*, 745 F.2d 1, 6, 223 USPQ 577, 581 (Fed. Cir. 1984). Of course, the ultimate conclusion of validity is a question of law freely reviewable by the court. *SSIH Equip.*, 718 F.2d at 375, 218 USPQ at 687.

statements by Parker are credible and as such should be relied on. Again, Surface would have the court consider those statements in support of its position while ignoring those that are damaging. At a minimum, the fact that Parker has taken contradictory positions undermines the credibility of his testimony. Also, the inconsistency of Parker's statements concerning the obviousness of the claimed invention, in view of the prior art, is but one factor relied on by the ALJ in reaching his conclusion.

Peterson submitted an affidavit in the reexamination proceeding attesting to the fact that there was absolutely no basis in the prior art "for expecting the outstanding wear resistance of polycrystalline diamond/electroless metal composites in comparison with natural and other diamonds, or for expecting the superior anchoring exhibited by the polycrystalline diamond particles in the electroless metal matrix." Peterson stated in his affidavit that the invention disclosed by the '285 patent "would not have been obvious to one of ordinary skill in the art at the time the invention was made." Peterson's testimony before the Commission, however, raised questions as to his credibility in regard to the factual basis for his conclusions and his understanding of the legal term "obvious."

From the prosecution history of the '285 patent, it is clear that the affidavits of Parker, Peterson, and Graham were an important factor in overcoming the section 103 rejection. The subsequent testimony of Parker and Peterson compromised the strength and effectiveness of the affidavits.

The substantial evidence test requires that the factual basis be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] The strength and effectiveness of the affidavits were jeopardized by the subsequent testimony of the affiants. On this record, we hold that there is substantial evidence to support the Commission's findings underpinning its conclusion that method claims 2 and 12–14 of the '285 patent are invalid under 35 U.S.C. § 103. Further, we find no error in the legal conclusion based on these factual findings.

INFRINGEMENT

Surface contends that the ALJ imposed an improper burden of proving infringement with respect to "nucleation bonding" and the electroless "strike layer."[9] Surface argues that the ALJ ignored its witnesses in favor of the group I and group II respondents' witnesses and that this resulted in a standard of proof "beyond a reasonable doubt" rather than the preponderance of evidence test. Surface contends that the visible manifestation of "nucleation bonding" is not always present. Surface introduced a "surface roughness" test

[8] *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (quoting *SSIH Equip.*, 718 F.2d at 382, 218 USPQ at 692 (additional comments of Judge Nies), quoting in turn from *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 477 (1951)).

[9] Since Surface failed to prove by substantial evidence of record that the accused products included "nucleation bonding" or "substantial nucleation," we do not need to reach the question of whether the accused products included deposition of a "strike layer."

to demonstrate that the diamond particles are catalytic to the electroless bath and that plating on the polycrystalline diamonds did occur. Contending that this was sufficient evidence to show infringement and that this evidence was unchallenged, Surface would have the court reverse the Commission on the holding of noninfringement of claims 1, 3, 4, and 7–11.

Surface argues that the term "nucleation bonding" should be broadly construed, so broadly that it would include articles where the "nucleation bonding" was not evident. This suggestion of broad construction of the claims is inconsistent with the language in the patent application as well as with the prosecution history of the '285 patent. In the '285 patent, the inventors distinguished between articles coated with diamond "A" particles (polycrystalline diamonds) that exhibited "nucleation bonding" and those that didn't. Examples 22 and 25 of the '285 patent revealed that no nucleation bonding occurred with diamond "A" particles. In distinguishing examples 22 and 25 from example 21, which demonstrated "nucleation bonding," the inventors stated "[t]he conclusion drawn from Examples 21, 22, and 25 is that bath composition can affect whether or not nucleation of electroless alloy grains will occur on diamond 'A' particles."

The method for determining whether "nucleation bonding" occurred in the examples set forth in the '285 patent, used scanning electron microscopy observations on the composite coatings. The examinations done by scanning electron microscope (SEM) are set forth in detail in the '285 patent. Surface was unsuccessful at demonstrating that any of the alleged infringing products exhibited "nucleation bonding" by the SEM method as described in the '285 patent. As an alternative attempt to prove infringement, Surface submitted its own "surface roughness" test to demonstrate that the diamond particles are catalytic to the electroless bath and that plating on the polycrystalline diamonds does occur. The "surface roughness" test was devised by Nathan Feldstein and his associate, Mr. Lancsek. Feldstein, a principal owner of Surface, admitted that the test never had been published and no independent substantiation was offered as to the efficacy, accuracy, and dependability of the new test. The ALJ dismissed Surface's evidence of the "surface roughness" test as not having been published and as lacking independent substantiation. The fact that Surface submitted the test for publication October 4, 1984, after the final decision in the proceeding, does not overcome the ALJ's basis for dismissal.

We conclude that the Commission's finding, that the group I and group II respondents did not infringe the asserted claims of the '285 patent, is supported by substantial evidence of record.

CONCLUSION

In summary, we conclude that, on this record, there was substantial evidence to support the Commission's factual findings underly-

ing its legal conclusion that method claims 2, 12, 13, and 14 of the '285 patent were invalid under 35 U.S.C. § 103. There was also substantial evidence to support the Commission's findings that product claims 1, 3, 4, and 7–11 were not infringed by certain CDC textile machinery components produced and/or sold by the group I and group II respondents. Accordingly, we sustain the Commission's determination that the group I and group II respondents did not violate 19 U.S.C. § 1337.

AFFIRMED

(Appeal No. 85–2525)

AFFILIATED FM INSURANCE CO., AS SUBROGEE OF FIAT MOTORS OF NORTH AMERICA, INC., AND FIAT MOTORS OF NORTH AMERICA, INC., APPELLANTS *v.* UNITED STATES, APPELLEE

Henry J. Catenacci, Podvey, Sachs & Catenacci, of Newark, New Jersey, argued for appellants. With him on the brief was *Herbert I. Waldman*.

Susan Hendler-Menahem, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

(Appeal No. 85–2525)

AFFILIATED FM INSURANCE CO., AS SUBROGEE OF FIAT MOTORS OF NORTH AMERICA, INC., AND FIAT MOTORS OF NORTH AMERICA, INC., APPELLANTS *v.* UNITED STATES, APPELLEE

(Decided February 14, 1986)

Before RICH, DAVIS, and BALDWIN, *Circuit Judges*.

BALDWIN, *Circuit Judge*.

This appeal is from a decision of the United States Court of International Trade dismissing petitioner's claim for a refund of customs duties or reliquidation of the entries for automobiles which had regularly entered this country and had subsequently been damaged by flood.

Petitioner's arguments are adequately treated in the lower court's opinion No. 85–47, dated April 19, 1985. We affirm on the basis of that opinion.

(Appeal Nos. 86-912/86-922)

NEC CORP., APPELLANT *v.* UNITED STATES, APPELLEE

Patrick F. O'Leary, Tanaka, Ritger & Middleton, of Washington, D.C., argued for appellant. With him on the brief was *H. William Tanaka*.

Velta A. Melnbrencis, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With her on the brief were *Richard K. Willard*, Assistant Attorney General and *David M. Cohen*, Director.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

(Appeal Nos. 86-912/86-922.)

NEC CORP., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided November 28, 1986)

Before RICH, BALDWIN, and BISSELL, *Circuit Judges*.

BALDWIN, *Circuit Judge*.

NEC Corporation's (NEC) action contesting an antidumping determination was dismissed by the United States Court of International Trade (trial court) due to untimely filing. *NEC Corp.* v. *United States*, 622 F.Supp. 1086 (1985), *reh'g denied*, 628 F.Supp. 976 (Ct. Int'l Trade 1986). We affirm.

BACKGROUND

NEC attempted to bring an action in the Court of International Trade contesting an antidumping determination. A summons to initiate the action was posted by certified mail to the trial court within the thirty day deadline for such appeals but the mailing was never delivered to the clerk for filing. Instead, the mailing was returned with the notation "insufficient postage." The summons was then remailed with sufficient postage, but out of time. Upon receipt, the clerk deemed the summons as having been filed on the latter, untimely mailing date. The United States then filed a Motion to Dismiss for Lack of Jurisdiction. NEC countered with a Motion to Correct the Filing Date. Acting on these motions, the trial court found that neither the summons mailed with insufficient postage nor the remailed summons met the filing requirement of Rule 5(g) of the Rules of the Court of International Trade which provides:

> (g) *Service and Filing—When Completed*
>
> Service or filing of any pleading or other paper by delivery or by mailing is completed when received, except that a pleading or other paper mailed by registered or certified mail properly addressed to the party to be served, or to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed served or filed as of the date of mailing.

In response to the Motion to Dismiss, NEC argued that affixation of proper postage was not a jurisdictional prerequisite when filing a summons pursuant to Rule 5(g) or alternatively that a factual determination as to whether excusable neglect existed to justify acceptance of the summons should be made. The trial court rejected these arguments and refused to take jurisdiction over the matter. Also denied was NEC's subsequent Motion for Rehearing and Amendment of Judgment. In support of this motion, NEC pointed out that since "proper postage" is nowhere defined in the Rules, the trial court should have used its discretion to make an excusable neglect determination or, alternatively, determine that proper postage had been affixed.

This is an appeal of the trial court's decisions of November 19, 1985 and January 10, 1986 refusing to accept the summons as timely filed under the portion of Rule 5(g) directed to deeming the filing date as of date of mailing.

OPINION

The proper filing of a summons to initiate an action in the Court of International Trade is a jurisdictional requirement which appellant has failed to meet.

The United States is immune from suit except in accordance with the terms and conditions under which it consents to be sued. Under 19 U.S.C. § 1516a an interested party may commence an action contesting an antidumping determination by properly filing a summons and complaint within 30 days after a notice of the determination is published in the Federal Register. This is a plain and unambiguous requirement of a 30 day deadline for commencement of an action. Meeting that deadline by mail is conditioned upon affixation of proper postage and mailing within 30 days.

The summons is to be filed in a manner prescribed by the Rules of the Court of International Trade. 19 U.S.C. § 1516a(a)(1). The rules prescribing the manner and method for filing a summons constitute terms and conditions upon which the United States waives its sovereign immunity. Suit is barred unless the summons is filed in conformity with these rules. 28 U.S.C. § 2636(c).

Contrary to the NEC assertion that deviation from the Rules of the Court of International Trade may be subject to excuse and remedied upon equitable principles, the requirement of a properly and timely filed summons is a requisite of jurisdiction which cannot be waived. *Georgetown Steel* v. *United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986). The terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit. *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Conditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions. *Lehman* v. *Nakshian*, 453

U.S. 156, 161 (1981), citing *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

For the foregoing reasons, we *affirm* the trial court's orders dismissing NEC's action and denying rehearing and amendment of judgment.

AFFIRMED

(Appeal No. 86–1033)

RBW INC., PER C.J. TOWER & SONS OF BUFFALO, INC., APPELLEE *v.* UNITED STATES, APPELLANT

Barbara M. Epstein, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellant. With her on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Steven P. Florsheim, Mandel & Grunfeld, of New York, New York, argued for appellee.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

(Appeal No. 86–1033)

RBW INC., PER C. J. TOWER & SONS OF BUFFALO, INC., APPELLEE *v.* UNITED STATES, APPELLANT

(Decided December 5, 1986)

Before DAVIS, SMITH, and NIES, *Circuit Judges.*

SMITH, *Circuit Judge.*

In the proceedings before the United States Court of International Trade, the issue was whether imported books of crossword puzzles, word games, and search-a-word puzzles were properly classified as "puzzles" under item 735.20 of the Tariff Schedules of the United States (TSUS), or as "books not specially provided for" under item 270.25, TSUS. The trial court held that "books of printed word puzzles are properly classified under item 270.25, TSUS [books not specially provided for]."

On the basis of the opinion of the trial court, *RBW, Inc.* v. *United States*, 632 F. Supp. 13 (Ct. Int'l Trade 1986), the judgment below is affirmed.

AFFIRMED

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

T17.6/3-4:

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U.S. Customs Service

Treasury Decision

19 CFR Parts 111, 171, and 178

(T.D. 86–161)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO CUSTOMS BROKERS; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In FR Doc. 86–19256, published as T.D. 86–161 on August 26, 1986 (51 FR 30336), Parts 111, 171 and 178, Customs Regulations (19 CFR Parts 111, 171, 178), were extensively revised to implement the statutory changes made by the Trade and Tariff Act of 1984, relating to customs brokers. Corrections were made to T.D. 86–161 on September 5, 1986, in 51 FR 31760, on September 10, 1986, in 51 FR 32208 and on October 9, 1986, in 51 FR 36221. It has come to our attention that another correction is necessary. On page 30346 of T.D. 86–161, it states that § 171.12(b), Customs Regulations (19 CFR 171.12(b)), is amended by removing the words "paragraph (c)" and inserting, in their place, "paragraph (c) or (d)".

It has now been determined that this change is unnecessary because of another change to § 171.12. By T.D. 85–195, published in the Federal Register on December 10, 1985 (50 FR 50287), various sections in Parts 162 and 171, Customs Regulations (19 CFR Parts 162, 171), relating to fines, penalties, and forfeiture procedures, were amended. One of the changes made by T.D. 85–195 was to revise § 171.12 in its entirety. As revised, § 172.12(b) no longer contains a reference to paragraph (c). Accordingly, the change made to § 171.12(b) by T.D. 86–161, which cannot now be made because of the change made by T.D. 85–195, is no longer needed.

To avoid any further confusion in this regard, the change made to § 171.12(b) by T.D. 86–161, is withdrawn.

EFFECTIVE DATE: September 25, 1986.

FOR FURTHER INFORMATION CONTACT: Steven I. Pinter or Fred Burns O'Brien, Entry, Licensing and Restricted Merchandise Branch (202–566–5765).

Dated: December 16, 1986.

B. JAMES FRITZ,
Director, Regulations Control,
and Disclosure Law Division.

[Published in the Federal Register, December 22, 1986 (51 FR 45761)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

PROPOSED CUSTOMS REGULATIONS AMENDMENT RELATING TO THE CUSTOMS SERVICE FIELD ORGANIZATION-BEAUFORT-MOREHEAD CITY, NORTH CAROLINA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; solicitation of comments.

SUMMARY: This document proposes to amend the Customs Regulations to change the Customs field organization by extending the geographic limits of the port of entry of Beaufort-Morehead City, North Carolina. Currently, Customs officers assigned to the port provide service at many locations which are outside the existing port limits. This proposed expansion will better serve the public by including several locations routinely requiring Customs service within the official port limits.

DATE: Comments must be received on or before February 17, 1987.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, (202–566–9425).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs proposes to amend § 101.3, Customs Regulations (19 CFR 101.3), by extending the geographic limits of the port of entry of Beaufort-Morehead City, North Carolina, located in the Wilmington, North Carolina, Customs District in the Southeast Region.

The expansion would incorporate into the port limits a number of locations where Customs service is now being provided, including the premises of Blue Bell, Inc., which is the only importer in the area that receives containerized cargo. All cargo examinations for Blue Bell are done at their premises. If the expansion is adopted, Blue Bell and any other importers within the expanded port limits would no longer be billed mileage charges, which currently total approximately $450 per year for the entire port area. The expansion would result in no additional workload and would require no additional personnel.

The proposed expanded port limits are as follows:

> The port of entry of Beaufort-Morehead City, North Carolina, shall include all that area in Carteret County, North Carolina, bounded by a line beginning at a point of intersection of State Road 1147 and U.S. Highway 70; then east along U.S. Highway 70 to its intersection with the corporate limits of Morehead City; then north and east along the corporate limits of Morehead City to its intersection with the west bank of Newport River; then north along the shoreline of the Newport River to Crab Point; then in a direct line eastward across Newport River to the mouth of Wading Creek; then east along the south bank of Wading Creek to its intersection with North Carolina State Road 101; then south along State Road 101 to its intersection with U.S. Highway 70; then south along U.S. Highway 70 to its intersection with Lennoxville Road; then east along Lennoxville Road to Lennoxville Point; then southwest across Taylor Creek and west along the southern shore of Carrot Island to a point opposite the western end of Horse Island; then in a direct line southwest to the southeast tip of Fort Macon State Park; then west along the south shore of Bogue Banks to a point directly south of State Road 1147; then north along State Road 1147 to the point of beginning.

If the proposed change is adopted, the list of Customs regions, districts, and ports of entry in § 101.3(b) Customs Regulations, will be amended accordingly.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This change is proposed under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by E.O. No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II) and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Imports, Organization and functions (Government agencies).

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this document relates to agency organization it is not subject to E.O. 12291. Accordingly, a regulatory impact analysis and the review prescribed by § 3 of that E.O. are not required. Similarly, this document is not subject to the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*) and the regulatory analysis and other requirements of 5 U.S.C. 603 and 604 are not applicable.

Customs routinely establishes and expands Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this amendment may have a limited effect upon some small entities in the area affected, it is not expected to be significant because establishing and expanding port limits in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: December 5, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 18, 1986 (51 FR 45345)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 86–122)

LONE STAR STEEL CO. AND CF & I STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, DALMINE SIDERCA, S.A.I.C., DEFENDANT-INTERVENOR

Court No. 85–06–00790

[ITC determination sustained.]

(Decided November 28, 1986)

Akin, Gump, Strauss, Hauer & Feld (Richard R. Rivers, Warren E. Connelly, Valerie A. Slater and *William J. Long)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile*, Assistant General Counsel, and *E. Clark Lutz*, United States International Trade Commission, for defendant.

Mudge, Rose, Guthrie, Alexander & Ferdon (David P. Houlihan and *Jeffrey S. Neeley)*, for defendant-intervenor.

OPINION

RESTANI, *Judge:* Plaintiffs challenge a final negative International Trade Commission ("ITC") determination.[1] ITC found that the injury suffered by the domestic oil country tubular goods ("OCTG") industry was not by reason of imports of OCTG from Argentina. Plaintiffs make two basic arguments: (1) ITC improperly failed to consider data regarding increased shipments of Argentine imports, lost sales and revenue and (2) ITC improperly failed to cumulate data on volume and effects of Argentine and Spanish OCTG imports.

FACTS

Plaintiffs filed administrative petitions on June 13, 1984, stating that OCTG from Argentina, Brazil, Mexico, Spain and Korea were being sold at less than fair value ("LTFV") and were causing or threatening material injury to the U.S. OCTG industry. *See* 19 U.S.C. § 1673 (1982). OCTG refers to several products, including oil well tubing, casing and drill pipe. Eventually affirmative final determinations under the antidumping laws were made with regard to Spanish OCTG. Final determinations were delayed in regard to

[1] The challenged determination is found in U.S.I.T.C. Publication 1694, May, 1985. A summary was published at 50 Fed. Reg. 21147 (May 22, 1985).

the other countries concerned, except Argentina. Although LTFV margins on Argentine imports were found to be 61.7 percent, no antidumping duties were imposed because of the negative ITC injury determination under discussion here. Duties are required to be deposited upon entry of the same merchandise pursuant to separate proceedings under the countervailing duty laws, where no injury requirement was applicable and subsidies were found to exist.

The record shows that channels of distribution and principal markets were the same for OCTG imports from Spain and Argentina. The record also shows that one type of OCTG was sold by importers of Argentine OCTG, but not importers of Spanish OCTG. Specifications of Spanish and Argentine OCTG differed.

Average margins of underselling were similar as between the imports of the two countries, but the trend of underselling with regard to the Argentine products was downward. Levels of underselling with regard to the Spanish product were increasing in 1984. ITC was able to obtain information on six possible instances of lost sales or revenue attributable to the price of Argentine imports. No other reason for lost sales surfaced. An additional sale was lost, according to the buyer, because the domestic supplier would only sell to the small distributor at end user, rather than distributor, prices. Approximately 500 tons of OCTG were involved in ITC's lost sales data. The demonstrated revenue lost in instances where Argentine imports competed, but the sale of the domestic product was made, was very small.

Volume of Spanish imports reflected a deep 1983 decline and a large 1984 surge.[2] Argentine imports volume was steady.[3] Shipments in the U.S. market, although lower than import volume, increased for both Spanish and Argentine imports from 1982–1984. Year end inventories as a percentage of U.S. shipments of the relevant imports decreased for both, but the percentages were consistently higher for Spanish imports.

Domestic OCTG consumption, production, shipments and capacity utilization statistics exhibited one pattern—low 1982 performance, less than half of that performance in 1983 and 1984 performance closer to 1982 levels. Employment and sales statistics dipped even lower in 1983 than did the statistics for the previous four factors, and 1984 figures do not approach 1982 levels. Operating losses appear in 1983 and continue in 1984.[4] Based on such facts ITC found that the domestic industry was experiencing material injury. It concluded, however, that Argentine OCTG did not contribute to such injury.

Reliance on Limited Criteria

ITC states that it based its negative injury determination with regard to Argentine OCTG on the following. Argentine OCTG import

[2] Spanish imports volume was: 1982–54,000 tons; 1983–23,000 tons; 1984–76,000 tons.
[3] Argentine imports volume was: 1982–17,000 tons; 1983–16,000 tons; 1984–20,000 tons.
[4] $.53 billion in operating income in 1982 turns into a $.26 billion operating loss in 1983 and a $.16 billion loss in 1984.

volume was low and stable, and the market share remained small. Levels of underselling decreased and year-end inventories of Argentine OCTG declined from 1982 to 1984.

These fact are accurate. Plaintiffs' objection is that other facts should have been considered and that those facts can only lead to the opposite conclusion. First, plaintiffs allege ITC did not consider shipments in the U.S. market. ITC obviously did so as demonstrated by the citation to inventories as a percentage of U.S. market shipments and by ITC's analysis of consumption. Plaintiffs also state that the decline in inventories reflects the release of a large quantity of stock so that shipments of Argentine imports in the U.S. market increased in comparison to U.S. shipments, giving Argentine imports a greater market share. This fact is evident from the record. ITC considered this increase, but noted that it was at a low level and was of a temporary nature.

The record reflects that because of anticipated demands in 1981, OCTG distributors increased their inventories. Demand did not materialize and inventories grew until demand rose in 1983. Shipments of Argentine imports did increase greatly in 1983, while new imports decreased, but the rate of increase dropped dramatically in 1984, as did the level of inventories. As shares of consumption, Argentine imports were almost equal in 1982 and 1984. The 1983 bulge is consistent with the unexpected lack of demand and a subsequent release of stored inventory. Plaintiffs attribute the 1984 return to 1982 levels as a reaction to unfair trade cases, for which the plaintiffs argue ITC must adjust. ITC's historical explanation is equally plausible. In this context, standing alone, the single factor of the increase in shipments does not mandate an affirmative finding.

Second, plaintiffs claim that underselling, even though it was decreasing, and the evidence of lost sales and revenue, demonstrate injury. Anecdotal evidence of lost sales and revenue rarely adds distinct information to a record of this type but rather confirms what is already substantially demonstrated by the presence of fairly fungible products from both Argentina and the United States in the market place, decreasing demand, rising shipments of imports and underselling by imports. These facts alone are evidence of lost sales and revenue due to imports and, more particularly, lost sales due to pricing. Thus, the point made here by plaintiffs is the same as is made in their first argument. The historical and economic context also provides the same explanation as it did previously. The court has indicated on other occasions that instances of lost sales alone do not mandate a finding of injury; rather it is for ITC to determine whether lost sales, together with other factors, indicate a causal nexus between LTFV imports and material injury to the domestic industry.[5]

[5] The lost revenue data is so minimal as to be virtually meaningless.

The court finds substantial evidence for ITC's conclusion that a historical economic occurrence led to U.S. industry injury, which was exacerbated by steadily rising imports from various countries. It also finds support for ITC's conclusion that the pattern demonstrated by data regarding Argentine LTFV imports varies from the pattern of injury to the U.D. industry. For example, domestic industry performance deteriorated substantially between 1982 and 1984, while Argentine imports remained stable, and the 1983 increase in market share all but evaporated. As a whole the record adequately supports the ITC determination that the material injury suffered by the U.S. industry was not caused in any significant way by OCTG from Argentina.

CUMULATION

As the parties readily admit, the cumulation provision of the Trade and Tariff Act of 1984, 19 U.S.C. § 1677(7)(C)(iv) (1982 & Supp. III 1985) does not apply directly to the proceeding under review. Nor have the parties cited any authority indicating that in enacting the 1984 provision Congress was merely clarifying previous law.

Prior law allowed ITC substantial discretion in determining whether to cumulate data on volume and effects of imports. Under such law, where there is data, apart from the data sought to be cumulated, that supports the conclusion that imports from one country do not contribute to material injury or do not compete in the same markets as the other imports involved, ITC properly may consider it inappropriate to cumulate data. *See, e.g., Gifford-Hill Cement Co.* v. *United States*, 9 CIT ——, 615 F. Supp. 577 (CIT 1985). On the other hand, it may very well be an abuse of discretion to fail to cumulate solely because the very data sought to be cumulated is insufficient standing alone to establish a causal connection to material injury.[6]

The ITC majority states that it did not cumulate data because the patterns of import volume and market share differed as to imports from the two countries.[7] One commissioner also noted, *inter alia*, that the specifications of the Spanish and Argentine products were different.

If the ITC majority had listed small volume or market share as its reason for not cumulating, the validity of the legal basis on which it rests its decision would be debatable. Here, however, rather than just absolute levels, numerous trends, including those cited by the majority, reveal significant differences in the effects of Argentine and Spanish imports. Absent from this case are two classic patterns. The first is where competing imports from two countries, if considered alone, might be said to have a *de minimis* impact, but considered together the effect is significant. The second is where one coun-

[6] Avoidance of this type of circularity may have been one of the reasons for the 1984 cumulation provision.

[7] One commissioner would require "concerted action" before cumulating. If this implies some intention requirement, there was no authority cited for such a position.

try's imports cause injury and another country's imports, although of small volume, contribute in some way to injury when added to the other imports. Here the finding of ITC is that no contribution to injury by Argentine OTCG existed. In this case, cumulation of data would obscure significant differences in trends. Prior to the effective date of the 1984 statutory amendment, ITC could consider this type of data in making its discretionary determination on cumulation. In addition, there is a problem in stating that Spanish and Argentine goods compete in the same market and therefore cumulation is appropriate. There is little overlap in the subcategories of OCTG products imported from the two countries and thus competition in the same markets by all relevant imports is unlikely.[8]

Plaintiffs have not demonstrated that an improper legal standard was applied under prior law. Furthermore, the subcategory product data, not cited by the ITC majority, does not lead to an opposite conclusion, but merely bolsters the decision. Therefore, the court finds ITC acted within its discretion in not cumulating data on Argentine and Spanish OCTG imports.

ITC's determination is found to be based on substantial evidence and to be in accordance with law.

(Slip Op. 86–123)

R.J.F. FABRICS, INC., PLAINTIFF *v.* UNITED STATES, U.S. CUSTOMS SERVICE, REGIONAL COMMISSIONER OF CUSTOMS AT NEW YORK, AND AREA DIRECTOR OF CUSTOMS AT NEWARK, DEFENDANTS

Court No. 86–11–01376

[Defendants' motion to dismiss denied; plaintiff's motion for injunctive relief denied.]

(Decided December 1, 1986)

Soller, Singer & Horn (Melvin E. Lazar, Gerald B. Horn, Margaret H. Sachter and *Carl R. Soller)* for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice *(Florence M. Peterson)* for defendants.

OPINION

TSOUCALAS, *Judge:* Plaintiff, R.J.F. Fabrics, Inc., commenced an action in this Court on November 4, 1986 against the above-captioned defendants (hereinafter referred to as "defendant" or "United States"). At that time, plaintiff moved for a temporary restraining order and a preliminary injunction releasing its textiles which had been first excluded, and later seized, by Customs. The Court scheduled a hearing on plaintiff's motion for injunctive relief on Novem-

[8] Plaintiffs cite *American Grape Growers Alliance* v. *United States*, 9 CIT ——, 615 F. Supp. 603 (1985) for the proposition that the court cannot consider subcategories of the "like product" under discussion. *American Grape Growers*, however, involved a preliminary determination and does not control a pre-1984 discretionary cumulation decision at the final stage.

ber 6, 1986. Despite telephone conferences with the Court on Nov. 4 and Nov. 5, defendant initially advanced its jurisdictional objections in a brief submitted the morning of that hearing. The parties presented the question of jurisdiction as turning largely on the distinction between "seizure" and "exclusion" of merchandise. According to defendant, this action involved a seizure and should be heard in district court, pursuant to 28 U.S.C. § 1356 (1982). Plaintiff devoted the bulk of its jurisdictional argument to demonstrating the proposition that "the vehicle through which the merchandise has been excluded has been a seizure." Tr. of Oral Argument, Nov. 6, 1986 at 7. In effect, seizure could be treated as equivalent to exclusion, and could be validly protested. The parties indicated that they welcomed prompt decision on the motion and at the hearing's close, they expressed no desire to submit post-hearing briefs. In a ruling from the bench, the undersigned dismissed plaintiff's action due to a lack of subject matter jurisdiction over a seizure of the goods by Customs. The Court also held that even if plaintiff could establish that jurisdiction properly rests in this Court, a preliminary injunction would be denied since such relief was not warranted under the relevant criteria and would amount to granting the final relief requested by plaintiff: the return of its merchandise. Subsequently, plaintiff moved for a rehearing claiming that it had not sufficient time at the original hearing to adequately prepare an argument in support of its position. In an effort to ensure comprehensive treatment of the jurisdictional issues raided by the parties, and to rectify any significant flaws made in the conduct of the original proceeding, *W.J. Byrnes & Co.* v. *United States*, 68 Cust. Ct. 358, C.R.D. 72–5 (1972), the Court, in exercise of its discretion, *Commonwealth Oil Refining Co.* v. *United States*, 60 CCPA 162, 166, C.A.D. 1105, 480 F.2d 1352, 1355 (1973), granted a rehearing on the question of jurisdiction which was held on November 17, 1986. After consideration of the arguments presented, and in light of authority uncovered by the Court's own research, the judgment of November 6, 1986 is vacated.

BACKGROUND

Entry of the shipment of plaintiff's textiles was denied by Customs on July 2, and July 11, 1986 as part of an ongoing investigation into the transshipment[1] of goods. The goods were suspected of originating from Korea, and not from Japan as indicated on the accompanying entry papers. Customs seized the textiles on August 15, 1986. On August 21, 1986, Customs sent plaintiff a document entitled "Notice of Seizure Under 19 USC 1592" explaining that seizure had been necessary to prevent the introduction of restricted merchandise, under allegedly fraudulent documents, into the commerce of the United States in an attempt to by-pass quota/visa require-

[1] It has been estimated that 86 million sq. yards of fabric, made largely in Southeast Asia, has been shipped through Japan to the United States in 1986. See The Journal Of Commerce, Nov. 6, 1986, § A, at 1, col 5.

ments. *Plaintiff's Verified Complaint*, Exhibit F. An attachment to the document also made mention of an alleged violation of 18 U.S.C. § 545. *Id.*, Attachment "A." On September 10, plaintiff protested "the exclusion of the merchandise * * * by the seizure of said merchandise by the U.S. Customs Service." *Plaintiff's Verified Complaint*, Exhibit G. It claimed the relevant documentation demonstrated that Japan was the country of origin of the textiles. *Id.* The protest was denied on October 3, 1986. As stated earlier, an action was commenced in this Court on November 4, 1986, by the filing of a summons and verified complaint.

Plaintiff sought a judgment sustaining its protests and declaring Japan as the country of origin of its merchandise. Plaintiff also sought return of its merchandise pending final decision, alleging that failure to recover its goods for the purpose of sale into the commerce of the United States would result in its demise as a going concern by December, 1986. Defendant asserted that this Court did not have jurisdiction over the action and that in any event plaintiff had failed, under the appropriate criteria, to make a sufficient showing to warrant the issuance of an injunction. Defendant also expressed concern that the exercise of jurisdiction by this Court might interfere with a continuing criminal investigation conducted by the U.S. Attorney's Office. To date, no criminal proceedings, nor any forfeiture proceedings, have commenced.

JURISDICTION

Customs seized the goods pursuant to 19 U.S.C. § 1592 (1982) and 18 U.S.C. § 545 (1982). It is settled that jurisdiction over claims brought pursuant to § 545 usually does not lie in this Court. 28 U.S.C. § 1355 (1982); *United States* v. *Gold Mountain Coffee, Ltd.*, 8 CIT 247, 249, 597 F. Supp. 510, 513, *reh'g denied*, 8 CIT 336, 601 F. Supp. 212 (1984) (declining to assert ancillary jurisdiction over § 545 claim where plaintiff instituted a penalty action under § 1592). Defendant urges that, pursuant to 28 U.S.C. § 1356 (1982), jurisdiction over the seizure in this action is fixed in the district courts. Section 1356 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.[2]

Against this background, plaintiff attempts to prove that this Court has properly acquired subject matter jurisdiction. *See United States* v. *Biehl & Co.*, 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1982). Plaintiff contends that jurisdiction exists pursuant to 28 U.S.C. § 1581(a) (1982) because its protest against the exclusion of the mer-

[2] 28 U.S.C. § 1582 (1982 & Supp. II 1984) concerns actions commenced by the United States.

chandise was denied. *See* 19 U.S.C. § 1514(a)(4) (1982 & Supp. II 1984). Alternatively, plaintiff premises jurisdiction on 28 U.S.C. § 1581(i)(3) or (i)(4) (1982). It argues that the underlying subject matter of this dispute concerns the quantitative restriction that its goods may be subject to if, in fact, their country of origin is Korea.

Section 1581(a)

Defendant focuses on the distinction between seizure and exclusion. It argues that when § 1514(a)(4) refers to "exclusion" as a protestable decision, it actually means "exclusion and not seizure." In effect, defendant views 19 U.S.C. § 1514(a)(4) and 28 U.S.C. § 1356 as operating together to allow judicial review of an exclusion in the CIT but to require that private parties commence suit in district court once a seizure is made by Customs. Plaintiff responds that the exclusion was effected through seizure and that seizure "simply restrains the merchandise until Customs concludes its inquiry into its country of origin." *Plaintiff's Memorandum of Law in Support of Motion for Rehearing* at 8. "The seizure in the present case is a provisional remedy only, a declaration of status, not an action against the merchandise *per se*." *Id.* at 11.

Contrary to defendant's assertion, a finding of § 1581(a) jurisdiction does not require that "this Court determine[ ], as a matter of fact, that an exclusion is synonymous with a seizure." *Defendant's Opposition to Motion for Rehearing* at 5. Indeed, the Court agrees that the act of exclusion differs from that of seizure. The practical effect of the former act is to deny entry into the customs territory of the United States. The importer may then dispose of the goods as he chooses. In the case of seizure, however, the government often takes control of the merchandise, and may ultimately institute forfeiture proceedings. This distinction notwithstanding, it is clear that plaintiff protested the exclusion of its merchandise, and § 1514(a)(4), by its terms, allows this Court to review the denial of the protest. There is no doubt that plaintiff could have protested Customs' action after denial of entry on July 2 and July 11. The Court is unwilling, therefore, to adopt a rule that would divest the Court of International Trade of jurisdiction simply because plaintiff filed its protest after Customs chose, on August 15, to formally seize the subject goods.

Defendant's cited authority provides no basis for a contrary result. The decision in *Seaside Realty Corp.* v. *United States*, 9 CIT 178, 607 F. Supp. 1481 (1985) involved an attempt to interfere with district court forfeiture proceedings commenced under 18 U.S.C. § 545. In *Seaside*, the defendant had voluntarily dismissed its 19 U.S.C. § 1592 claim. In contrast, no forfeiture proceedings have begun in the instant case and there is no indication that the United States has abandoned its § 1592 claim. Moreover, it is significant that the authority relied upon by the *Seaside* Court, *Jones v. American Guild of Variety Artists*, 199 F. Supp. 840 (E.D. Pa. 1961),

stands only for the proposition that it is within the discretion of the trial court to dismiss a subsequent action where a prior filed action involving the same issues is pending. *Jones,* 199 F. Supp. at 841.

Similarly, the Court in *United States* v. *Eight Bales #S I.J.K. Raw Mink Skins,* 227 F. Supp. 425 (S.D.N.Y. 1964) held that it had exclusive jurisdiction over the forfeiture of prohibited merchandise. *Id.* at 429. The Court noted the distinction between proceedings for forfeiture and those to review an exclusion and observed that a "District Court is without jurisdiction to review a collector's exclusion order." *Id.* As stated above, there are no prior proceedings to be interfered with in the case at bar.

That a number of cases wherein jurisdiction was exercised involved protests of exclusions and not seizures, *see, e.g., Wear Me Apparel Corp.* v. *United States,* 1 CIT 194, 511 F. Supp. 814, (1981), sheds no light on the issue of whether this Court's jurisdiction over an exclusion ceases upon the seizure of merchandise by Customs. Interestingly, reported decisions, whether decided under § 1581(a) or § 1581(i), fail, in any way, to buttress defendant's theory that seizure cases may not be heard in the CIT because of 28 U.S.C. § 1356. In *Rey Cafe Coffee Co.* v. *Pitman,* 5 CIT 112 (1983), Judge Boe denied an application for a temporary restraining order releasing coffee beans seized by Customs.[3] In *Siaca* v. *United States,* 7 CIT 10, *reh'g denied,* 7 CIT 207, 585 F. Supp. 668 (1984), *aff'd,* 754 F.2d 988 (Fed. Cir. 1985), the action was dismissed for lack of subject matter jurisdiction. Plaintiff in *Siaca* sought damages for an illegal search and seizure and Congress had taken a "clear stand" against waiving sovereign immunity for tort actions seeking damages based on illegal search and seizures by customs officers. *Siaca,* 754 F.2d at 989. The appellate court also agreed with the trial court that the importer could not contest the assessment of duties due to its failure to adequately exhaust administrative remedies. *Id.* at 988. Finally, the equitable concept of "anamolous jurisdiction" was inapplicable since, *inter alia,* plaintiff could not establish a lawful right to the subject property. *Id.* at 991–92. Plaintiff in the instant case has pursued the appropriate administrative procedure and properly seeks a declaratory judgment concerning country of origin of its merchandise excluded from entry by Customs.

Section 1581(i)

A party must exhaust meaningful opportunities for protest instead of resorting to § 1581(i) as a jurisdictional basis. *See United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 183–84, 687 F.2d 467, 472 (1982). Plaintiff has followed that course in the instant case; nonetheless, the Court will discuss the reasons why jurisdiction would

[3] Jurisdiction is not discussed in that opinion but I believe that if either the Court or the parties had perceived a jurisdictional question, the issue would have at least been mentioned. Moreover, while it is sometimes true that jurisdictional issues are not decided prior to motions for injunctive relief, a court taking that approach will often make a statement to that effect. *See Hyundai Pipe Co.* v. *United States,* 10 CIT ——, Slip. Op. 86–114 at 7 (Nov. 5, 1986); *Anderson* v. *United States,* 9 CIT 252, Slip. Op. 85–56 at 5 (May 13, 1985).

exist under § 1581(i) if there were no other adequate remedies under § 1581.

Plaintiff views this action as arising out of a law of the United States providing for quantitative restrictions not for health or safety reasons, or at least arising out of the administration or enforcement of a law providing for such quantitative restrictions. Therefore, exclusive jurisdiction rests in the CIT under § 1581(i)(3) or (i)(4).[4] Defendant again relies on what it asserts is the plain language of 28 U.S.C. § 1356 placing jurisdiction over seizure matters, with limited exceptions, in the district court.

While it is true that the wrong addressed by 19 U.S.C. § 1592(a) is attempted entry under false documents—allegedly false with respect to country of origin—it is equally true that seizure pursuant to § 1592(c)(5) is only authorized where there is a violation of § 1592(a) *plus* the presence of an additional statutorily specified element; in this case, the need to prevent restricted merchandise from entering the country. Thus, seizure would not have occurred unless Customs believed that possible violation of a quota existed.

In any event, defendant's approach of looking to general jurisdictional provisions, such as 28 U.S.C. § 1356, to demarcate the limits of this Court's jurisdiction has been explicitly rejected by the Court of Appeals for the Federal Circuit:

> The jurisdiction granted to the U.S. Customs Court, predecessor to the Court of International Trade, has long been recognized as an exception to the jurisdiction of the district courts under 28 U.S.C. § 1331, i.e., federal question jurisdiction. *See, e.g., Sneaker Circus, Inc.* v. *Carter,* 566 F.2d 396, 398–99 (2d Cir. 1977), and cases cited therein. Thus, it is faulty analysis to look first to the jurisdiction of the district courts to determine whether the CIT has jurisdiction. Given the broad jurisdictional grant to district courts, a district court would always have jurisdiction, rather than the CIT, using this approach. The result would negate the intent of Congress in granting *exclusive* jurisdiction over certain matters to the CIT. The focus must be solely on whether the claim falls within the language and intent of the jurisdictional grant *to* to the CIT. Since no new claims were created by the Customs Courts Act of 1980 (the 1980 Act), Pub. Law No. 96–417, 94 Stat. 1727 (1980), which created the CIT, the expanded jurisdiction given to that court, *a fortiori,* means that additional exceptions to the jurisdiction of district courts must result.

[4] Section 1581(i) provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

* * * * * * *

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

Vivitar Corp. v. *United States,* 761 F.2d 1552, 1559–60 (Fed. Cir. 1985), *aff'g,* 7 CIT 170, 585 F. Supp. 1419 and 8 CIT 109, 593 F. Supp. 420 (1984), *cert. denied,* 106 S. Ct. 791 (1986).[5]

The legislative history to the Customs Courts Act of 1980, P.L. 96–417, 94 Stat. 1727 (1980), indicates that Congress sought to create a "comprehensive system of judicial review of civil actions arising from import transactions." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3731. This action requires a determination as to country of origin of merchandise excluded for possible violations of quota requirements. This is precisely the type of matter that should be decided in the CIT since to do so furthers the Congressional intent that the Court's expertise be "exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws * * *." H.R. Rep. at 28, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 3739.

There is no reason that plaintiff's action must be dismissed simply because civil forfeiture or criminal proceedings may at some unspecified point be brought in the district court. *See United States* v. *Tabor,* 9 CIT 233, 608 F. Supp. 658 (1985); *United States* v. *Gold Mountain Coffee, Ltd.,* 8 CIT 247, 597 F. Supp. 510, *reh'g denied,* 8 CIT 336, 601 F. Supp. 212 (1984), (§ 1592 penalty actions allowed to proceed in CIT without exercise of pendent or ancillary jurisdiction over § 545 claims). *See also Azurin* v. *United States,* 10 CIT ——, 632 F. Supp. 30, 31 (1986) (jurisdiction exists over mandamus action to compel release of property held by Customs despite filing of similar action in district court). Defendant may not frustrate this Court's exercise of jurisdiction by invoking the specter of future proceedings in other courts.

Preliminary Injunction

The criteria for granting a preliminary injunction are: (1) a threat of immediate and irreparable harm; (2) likelihood of success on the merits; (3) that the public interest would be better served by issuing rather than by denying the injunction; and (4) the balance of hardships on the parties favors issuing the injunction. *See S.J. Stile Associates Ltd.* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981). It is often written that the plaintiffs bear a heavy burden of persuasion in demonstrating the need for this type of extraordinary relief. *See, e.g., Zenith Radio Corp.* v. *United States,* 1 Fed. Cir. 74, 77, 710 F.2d 806, 809 (Fed. Cir. 1983). Further, it is well settled that the purpose of injunctive relief is to maintain the status quo, not to grant the final relief sought if the movant

[5] *See also Ingram Contractors, Inc.* v. *United States,* 592 F.2d 832, 833 (5th Cir. 1979); *Fritz* v. *United States,* 535 F.2d 1192, 1194 (9th Cir. 1976); *J.C. Penney Co.* v. *United States Treasury Dep't,* 439 F.2d 63, 65–66 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971); *but cf. Olympus Corp.* v. *United States,* 792 F.2d 315, 318 (2d Cir. 1986); *Coalition to Preserve the Integrity of American Trademarks* v. *United States,* 790 F.2d 903, 905–07 (D.C. Cir. 1986) (CPIAT), *petition for cert. filed,* 55 U.S.L.W. 3343 (U.S. Oct. 16, 1986) (No. 86–624). Even adopting the reasoning of *Olympus* and *CPIAT,* this case should be heard in the CIT since it falls into a category of "cases enumerated in 28 U.S.C. § 1581(i) [that] all specifically deal with traditional Customs matters (and thus lie within the Court of Internation Trade's expertise) * * *." *CPIAT,* 790 F.2d at 907. "Section 1581(i)(3) only extends to quotas and embargoes arising out of trade policy, the sort of measures that have traditionally limited the importation of shoes, textiles, automobiles, and the like." *Id.*

should ultimately prevail on the merits. *See Associated Dry Goods Corp.* v. *United States*, 1 CIT 306, 311, 515 F. Supp. 775, 780 (1981); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). For this reason alone, plaintiff's motion for a preliminary injunction must be denied.

It should also be noted that there are several factors which cast doubt on plaintiff's assertion of irreparable injury flowing from the seizure. Plaintiff waited from the time of notice of the seizure, August 21, 1986, until November 4, 1986 to commence an action and to seek injunctive relief. Additionally, representations were made to the Court that a principal of the plaintiff, Mr. Isaac Cavaliero, might lose his "home" if R.J.F. Fabrics were not able to raise funds through the sale of the seized goods to pay creditors. *See Plaintiff's Motion for Preliminary Injunction,* Affidavit of Gerald B. Horn, at 3, ¶14. As counsel for the defendant mentioned, simple examination of the mortgage agreement reveals that Mr. Cavaliero is listed as residing at 300 E. 34th St., New York, N.Y. while the mortgaged property is located in the state of New Jersey. *See Plaintiff's Verified Complaint,* Exhibit E.

In addition, while the merits of its claim are not under consideration at this time, plaintiff has not made, for the purposes of a motion for injunctive relief, a convincing showing of likelihood of success on the merits; it has merely referred to the entry documentation showing Japan as the country of origin. In contrast, evidence in possession of defendant has been revealed, *in camera,* which tends to support defendant's claim as to country of origin. The Court is also mindful that a search warrant has been issued in connection with defendant's investigation. If a criminal action is ultimately brought, the textiles will be needed as evidence. Lastly, the obvious point of preventing entry of restricted merchandise is to keep it out of United States commerce. Turning possession of the goods over to plaintiff for resale would defeat that goal and might frustrate the ability of the defendant to pursue the available remedies should the latter prevail on the merits. For these reasons, it would be inappropriate to grant the extraordinary remedy of a preliminary injunction returning custody of the goods to plaintiff.

CONCLUSION

Plaintiff has properly invoked the jurisdiction of this Court by contesting the denial of a protest of the exclusion from entry of its merchandise pursuant to 28 U.S.C. § 1581(a). Even if the exclusion were not considered protestable, jurisdiction exists under § 1581(i) since plaintiff's cause of action arises out of the administration and enforcement of a quantitative restriction on imported goods. Therefore, the Court vacates its judgment order on November 6, 1986 in Court No. 86–11–01376 and hereby enters an order, exercising jurisdiction over plaintiff's claim, in conformity with this opinion.

Furthermore, plaintiff has not made the requisite showing for a preliminary injunction and in any event, such relief would amount to granting plaintiff the same remedy it would achieve upon success on the merits. For these reasons, the motion for injunctive relief is denied.

(Slip Op. 86–124)

AL TECH SPECIALTY STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 84–08–01192

[Judgment for defendant.]

(Decided December 1, 1986)

Collier, Shannon, Rill & Scott (David A. Harquist, Paul C. Rosenthal, Jeffrey S. Beckington) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Platte B. Moring, III,* Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* Plaintiffs contest the results on remand to the International Trade Administration of the Department of Commerce (Commerce) of an early determination of antidumping duties imposed on entries of tool steel produced by Arbed Saarstahl GmbH (Saarstahl), a West German manufacturer.[1] Specifically, plaintiffs challenge Commerce's decision not to include subsidies in cost of production and constructed value calculations made pursuant to section 736(c) of the Tariff Act of 1930 as amended (Act). 19 U.S.C. § 1673e(c) (1982).

On July 25, 1984, Commerce published the final results of its accelerated review of Saarstahl's entries of tool steel between January 12 and July 19, 1983. 49 Fed. Reg. 29,995 (1984). In that determination, Commerce refused to add the amount of subsidies received by Saarstahl to the company's expenses in calculating cost of production and constructed value.[2] Plaintiffs commenced an action to challenge those results and Commerce consented to a remand order on the subsidies issue. On remand, Commerce responded to additional comments on the subsidies issue and again concluded that subsidies should be excluded from its calculations.[3] Commerce concluded that the costs recorded in Saarstahl's books fairly represented the costs of producing the products. 51 Fed. Reg. at 10,072. Plaintiffs then filed the Renewed Motion for Judgment Upon an Agency Record that is presently before this court.

[1] These remand results were published in the Federal Register on March 24, 1986. 51 Fed. Reg. 10,071 (1986).

[2] The subsidies alleged to benefit Saarstahl's tool steel production include interest-free loans and funds for restructuring.

[3] Commerce's remand determination also corrected alleged errors in its calculations and thereby increased Saarstahl's weighted-average dumping margin for the period under review from 8.09 percent *ad valorem* to 19.13 percent *ad valorem.* 51 Fed. Reg. at 10,072. Saarstahl is challenging that determination in a separate action before this court. Court No. 86–04–00469.

Under the Act, dumping margins are measured by calculating the amount by which foreign market value (FMV) exceeds the United States price (USP) of imported merchandise. 19 U.S.C. § 1673 (1982 & Supp. II 1984). The methods by which FMV and USP are determined are specifically provided for in the Act. 19 U.S.C. §§ 1677b (FMV), 1677a (USP). Where, as here, merchandise identical or similar to the imported merchandise is sold or offered in the home market of the country of exportation, FMV is calculated pursuant to section 773(a) of the Act by resort to domestic prices, with certain specified adjustments. 19 U.S.C. § 1677b(a)(1)(A) (1982 & Supp. II 1984). Section 773(b) provides, however, that home market sales "made over an extended period of time and in substantial quantities * * * [that] are not at prices which permit recovery of *all costs* within a reasonable period of time in the normal course of trade, shall be disregarded in the determination of foreign market value." 19 U.S.C. § 1677(b) (1982) (emphasis added). This section further provides that.

> [W]henever sales are disregarded by virtue of having been made at less than the *cost of production* and remaining sales, made at not less than *cost of production*, are determined to be inadequate as a basis for the determination of foreign market value [through home market sales], the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

Id. (emphasis added).

Commerce concluded, in its accelerated review and on remand, that Saarstahl's home market sales were *not* less than the cost of production, and thus apparently calculated FMV through constructed value only where there were no contemporaneous home market sales for comparison with USP. 51 Fed. Reg. at 10071; 19 U.S.C. § 1677b(a)(2) (1982). The elements of constructed value used by Commerce are defined in section 773 of the Tariff Act as

> (A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;
>
> (B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—

(i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and

(ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

19 U.S.C. § 1677(b)(e)(1) (1982 & Supp. II 1984).

Plaintiffs argue that sections 773(b) and (e) require that costs be calculated by adding subsidies benefiting production in Commerce's determinations of cost of production and constructed value, respectively. Plaintiffs base their claim on the language of sections 773(b) and (e), relevant legislative history, judicial precedent and administrative practice. Defendant urges that these same sources support Commerce's conclusion that cost of production and constructed value should be calculated by using actual costs, rather than such theoretical costs.

I. Scope of Review

Initially, the parties disagree about the amount of deference that this court should give to Commerce's remand determination. Although the parties agree that the proper standard of review is essentially one of reasonableness, they disagree about the level of scrutiny that the term "reasonable" requires.

Plaintiffs argue that the issue involved in this case is essentially one of law, over which the agency has no discernible expertise. They contend that this court, as the ultimate arbiter of statutory construction, should conduct a searching inquiry into the propriety of defendant's interpretation. *Chevron, U.S.A., Inc.* v. *National Resource Defense Council,* 467 U.S. 837, 843 (1984). The defendant argues that its experience in regulating the antidumping act entitles it to special deference. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450–451 (1978). Under defendant's proposed standard of review, *any* reasonable agency interpretation would be upheld by this court. *Chevron,* 467 U.S. at 845.

It is well established that the Secretary of Commerce has broad discretion in executing the antidumping laws. *Smith Corona Group* v. *United States,* 713 F.2d 1568, 1570 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). Thus, agency interpretations in this area will normally be upheld if they are reasonable and do not contravene the plain language or purpose of the statute. This deference, however, should in no way be construed as a rubber stamp for the government's interpretation of statutory provisions. In the case at bar, there are convincing reasons to approach the government's determination with a heightened sense of scrutiny. Commerce has itself admitted that judicial precedent on the issue of subsidies is inconsis-

tent. Furthermore, there has been no consistent administrative practice with respect to adding or subtracting subsidies from cost of production and constructed value calculations. Commerce's interpretation of section 773 was adopted only as a consequence of this action; thus, there has been no protracted reliance by the government or by private parties on the new policy regarding subsidies.

In a recent case, this court addressed the issue of judicial deference to agency interpretations and concluded:

> The extent or degree to which the Court should defer to the agency is dependent upon a number of factors. As the Supreme Court explained in a leading case,
>
> > We consider that the rulings, interpretations and opinions of the [administrative official], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. *Swift & Co.*, 323 U.S. 134, 140 (1944). *Ceramica Regiomontana* v. *United States*, 10 CIT——, Slip Op. 86–58 (May 29, 1986). In light of these standards, this court must perform a searching inquiry of Commerce's position to determine its reasonableness in light of the language of section 773 and its underlying legislative purpose.

II. Legislative History

It is an established principle of jurisprudence that where a statute's meaning is clear, that meaning will be controlling, even if relevant legislative history suggests another plausible interpretation. *Tennessee-Valley Authority* v. *Hill*, 437 U.S. 153, 173 (1978). Utilizing this principle, plaintiffs initially argue that Commerce's remand determination is contrary to law because it misconstrues the "unambiguous meaning" of sections 773(b) and (e). Specifically, plaintiffs contend that the language of these provisions referring to cost of production and constructed value must be interpreted to mean a producer's objective costs, including the costs covered by subsidies, rather than the subjective costs, as reflected in the companies' books and records.[4] Although the language cited by plaintiffs clearly requires Commerce to consider a product's cost of production, it does not make clear *whose* costs are to be considered. Plaintiffs' argument merely begs the question of whether Commerce is required to consider subjective or objective costs.

[4] Section (b) requires the administrative authority to determine whether sales have been made "at less than the cost of producing the merchandise". Section (e) requires the calculation of constructed value based on the costs "which would ordinarily permit the production of that particular merchandise in the ordinary course of business."

Both parties have also supported their interpretations of section 773 by citing consistent related provisions in the antidumping statute. Plaintiffs argue that the appearance of statutory minima for profit and general expense calculations in section 773(e) demonstrates that Congress intended all cost terms to be defined objectively. Defendant points to 19 U.S.C. § 1677(16)(B)(i) (1982), which defines "such or similar merchandise" as "[m]erchandise produced in the same country and by the same person as the merchandise which is the subject of the investigation." Defendant argues that the statute's reference to the same producer demonstrates that costs were intended to be subjective.

These provisions do not address specifically the issue of subsidization, nor are they helpful in ascertaining which costs section 773 was intended to encompass. Since the terms of the statute are ambiguous, a discussion of relevant legislative history, case law, and administrative precedent is in order.

Both parties have cited a substantial body of legislative history to support their interpretations of sections 773(b) and (e). Yet, the vast majority of this material supports the parties' contentions only with the aid of strained reasoning.[5]

The most persuasive legislative history referred to by plaintiffs concerns the policies underlying the amendment of section 321(d) (the predecessor to section 773(b)) in the Trade Act of 1974. The 1974 Act expanded the definition of dumping to include certain situations in which producers sell goods at a price below the cost of production in their domestic markets as well as abroad. Plaintiffs argue that businesses who sell below cost both at home and abroad generally survive only with the aid of government subsidies; thus, the 1974 amendments, in order to be effective, must have been enacted to permit the calculation of all objective costs. This claim is supported by evidence showing that, prior to the enactment of the 1974 Act, Congress was apprised of a case in which a subsidized producer of paper-making machinery was selling below cost at home and abroad, but no dumping finding was made. *See Trade Reform: Hearings on H.R. 6767 Before the House Ways & Means Committee*, 93d Cong., 1st Sess. 3083 (1973) (statement of Eugene L. Stewart). Plaintiffs contend that Congressional dissatisfaction with this case served as the primary impetus for the amendment.

It is important to note that the testimony about the case referred to above was not received during the hearings on the 1974 Act; nor do the House or Senate reports on the 1974 Act mention the case, or a comparable justification for the amendment of section 321. Considering the relative paucity of legislative history cited by plaintiffs, and its tenuous connection to the actual history of the 1974 Act, the

[5] For example, plaintiffs cite two passages in the legislative history to show that Congress intended cost of production and constructed value to be based on the manufacturer's objective costs: a House of Representatives Report stating that section 773(b) was meant to cover the "cost of producing such merchandise" and "variable and fixed costs," and an earlier Senate report which declared that constructed value was not meant to be limited to the "actual cost of the imported merchandise." H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1973); S. Rep. 16, 67th Cong., 1st Sess. 13 (1921). These scattered snippets in the history, especially an unexplained quote from the history of the prior law, do not clarify whether all objective costs or only the manufacturer's costs were intended to be covered.

defendant's interpretation of the Act cannot be viewed as unreasonable solely in light of this history.

III. Judicial Precedent

In its remand results, Commerce concluded that judicial precedent in the antidumping area on the subsidies issue was divided and that Customs valuation cases were not proper authority for determining which costs should be factored in to calculate cost of production. Plaintiffs contend that defendant's interpretation of section 773 is unreasonable in light of all judicial precedent, and that Customs valuation cases do offer appropriate support for adding subsidies in cost of production and constructed value calculations.

Plaintiffs rely on two antidumping cases: *Connors Steel Co.* v. *United States,* 2 CIT 242, 527 F. Supp. 350 (1981) and *J.H. Cottman & Co.* v. *United States,* 20 CCPA 344, *cert. denied,* 289 U.S. 750 (1932). In *Connors Steel,* this court rejected the plaintiff's argument that subsidization necessarily meant that a manufacturer's home market sales were below the cost of production. 527 F. Supp. at 358. However, in *dictum,* the court stated that "if the actual calculation of cost of production is reached, the relevant subsidies cannot be ignored." *Id.* Plaintiffs rely on this statement to support their argument that subsidies are to be treated as a component of cost of production.

It is difficult to view this statement as providing strong support for plaintiffs' position. In *Connors Steel,* this court was addressing an entirely different issue, the sufficiency of evidence necessary to require an investigation into a producer's cost of production. Furthermore, the language cited by plaintiffs does not specify *how* the court would treat subsidies in calculating cost of production.[6]

The *Cottman* case provides stronger support for the plaintiffs' position. In *Cottman,* the Court of Customs and Patent Appeals held that a materials cost for phosphate rock must be included in cost of production where the manufacturer was the Moroccan government, which had obtained the raw materials at no cost. The majority wrote, "[f]oreign-market value, in our opinion, as defined in this statute was intended by Congress to mean such conditions as exist in a free, open, unrestricted market, where people meet under normal competitive conditions to buy and sell their goods." 20 CCPA at 357. Plaintiffs analogize the Moroccan government's free distribution of phosphate rock to the government subsidies received by Saarstahl in the case at bar. Plaintiffs argue that only by including these subsidies in cost of production can Commerce comply with the *Cottman* court's policy of simulating free market conditions.

The support garnered by plaintiffs from the *Cottman* case is undermined by the Court of Customs and Patent Appeals decision in *European Trading Co.* v. *United States,* 27 CCPA 289 (1940), involv-

[6] In *dictum,* the *Connors Steel* court agreed with Commerce's position that, "if anything, subsidization would *lessen* the cost of production" (emphasis added). In the context of the entire case, it is not clear what result this implies.

ing an antidumping order on entries of wire fish trap netting imported from Germany. The German seller of wire rods used to make the netting gave export rebates to the netting manufacturer, which were included by Treasury in calculating the cost of production of the wire. The CCPA disagreed with the government and held that the rebated amount should not be added into the cost of production. The court stated that the "foreign value" of the rods was not at issue, but rather the actual cost of production, as defined in the antidumping act. The court drew strong distinctions between the remedies available under the countervailing duty law and the remedies available under the antidumping law at issue.

Cottman should be given limited application for other reasons, as well. The *Cottman* court was faced with a situation which was difficult to deal with under prior law. As far as phosphate rock was concerned, Morocco acted as a non-market economy country. Prior antidumping law was not geared to such economies. Today, antidumping surrogate country provisions are applicable in non-market economy cases. *See Chemical Products Corporation* v. *United States*, 10 CIT——, Slip Op. 86-115 (November 6, 1986). Such provisions first appeared in the Trade Act of 1974. Trade Act of 1974, Pub. Law 93-618, § 321, 88 Stat. 2047 (1975). In market economy cases, countervailing duty remedies would now be available.[7] The legal, factual, and economic context of *Cottman* distinguishes it from this case.

Plaintiffs argue further that their position is supported by a customs valuation case in which cost of production was calculated on the basis of objective costs. *Ford Motor Co.* v. *United States*, 29 Cust. Ct. 553 (1952) (pattern equipment made by U.S. importer is properly added into cost of production of rough iron castings manufactured in and exported from Canada). In addition, see *Ravenna Mosaics* v. *United States*, 49 Treas. Dec. 699, T.D. 41503 (1926) (cost of preparing design sketches, which was paid by U.S. importer, was properly added into cost of production of mosaics exported to the U.S.).

These cases do not specifically address the issue of government subsidies, however; nor is it clear that customs valuation cases should always define "cost of production" as it is used in antidumping law. Citing a Senate report, plaintiffs agrue that the term "cost of production" was changed to "constructed value" in the 1958 Trade Act in order to facilitate conformity between customs and trade cases. S. Rep. No. 1619, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 *U.S. Code Cong. & Ad. News* 3499, 3505. Yet, this report merely announces that the term "constructed value" will be used in both areas of law; it does not associate the use of the term with a common policy of ascertaining objective value in all cases. Since the passage of the 1958 Act, Commerce has often refused to follow Customs valuation precedents where to do so would impede the specific

[7] Apparently because phosphate was not subject to regular duties, additional countervailing duties could not be imposed under law in existence at the time of *Cottman*. Tariff Act of 1922, ch. 356, title 3, § 303, 42 Stat. 935.

policies of the antidumping law. *See, e.g., Television Receiving Sets, Monochrome and Color, From Japan; Final Results of Administrative Review of Antidumping Finding,* 46 Fed. Reg. 30163 (1981) (stating that judicial decisions interpreting the phrase "freely offered" in the context of customs laws are irrelevant to interpreting the antidumping law).

Furthermore, one recent case demonstrates both the differing legal contexts in which these words must be applied and a somewhat subjective approach to calculating cost of production. In *M&M Mars Snackmaster* v. *United States,* 7 CIT 249, 587 F. Supp. 1075 (1984), this court held that for tariff purposes export rebates received after the time of manufacture should not be deducted from "cost of materials," but neither should they be added as additional profits, in calculating cost of production. The implication is that if the rebates had been received earlier they would have been *deducted* from the cost of materials figure. The court also noted the countervailing duty issue which was not before it. The judicial precedents cited by plaintiffs have failed to demonstrate that defendant's interpretation of sections 773(b) and (e) is unreasonable under existing case law.

IV. Administrative Practice

Plaintiffs contend that past administrative practice mandates the inclusion of subsidies in cost of production and constructed value calculations. Specifically, plaintiffs cite two Commerce determinations in *Shop Towels of Cotton from The People's Republic of China,* Fed. Reg. 37,055 (1983); 50 Fed. Reg. 26,020 (1985). In these antidumping cases Commerce looked to a surrogate country, Pakistan, to calculate foreign market value because China was found to possess a state-controlled-economy. Commerce concluded that Pakistan was an improper surrogate because its exports were subject to countervailing duty orders. 50 Fed. Reg. at 26,023.

Although the *Shop Towels* proceedings involved the interpretation of section 773(c), regarding state-controlled-economies, plaintiffs argue that the principle underlying these determinations is applicable to the case at bar. They contend that sections 773(c) and 773(b) were enacted concurrently to provide a reliable benchmark for foreign market value calculations. Since Commerce has concluded that potential surrogate economies are inappropriate for comparison purposes if they utilize subsidization, plaintiffs argue that subsidies must also be considered in section 773(b) calculations in order to achieve a consistent policy.

It is not clear why the practices governing the selection of surrogate economies should control the calculation of cost of production under section 773(b). Plaintiffs correctly note that under both provisions the failure to account for subsidies could lower the dumping margins calculated by Commerce. The failure to factor in subsidies, however, presents an irremediable problem only in state-controlled

economy cases. Because there is no way to compensate for the selection of a defective measuring rod under the statute, it is essential to select surrogate economies unaffected by subsidization. *Cf. Chemical Products* v. *United States*, 10 CIT ——, Slip Op. 86–115 (November 6, 1986). It is not necessary to consider subsidies in section 773(b) cost of production calculations, however, because the effects of subsidization can be addressed in a countervailing duty proceeding. The proper scope of the antidumping remedy, and not an overriding policy of calculating objective costs, defines the parameters of section 773(b).

Defendant has cited several administrative rulings in the antidumping area in which it actually subtracted production costs absorbed by foreign governments in the form of grants. *Preliminary Determinations of Sales at Not Less Than Fair Value: Certain Steel Products from the Netherlands*, 47 Fed. Reg. 35664 (1982) (production costs absorbed by the government in the form of grants subtracted to calculate cost of production in order to avoid possible double counting of subsidies in concurrent antidumping and countervailing duty investigations); *Red Raspberries from Canada; Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 19,768 (1985) (income from the Canadian government's Farm Insurance Income Program found unrelated to cost of production; wage rebate benefits subtracted as offsets to cost since such benefits were attributable directly to raspberry production). *See also, Certain Steel I-Beams from Belgium, Antidumping Determination of Sales at Not Less Than Fair Value*, 44 Fed. Reg. 54,579 (1979) (stating that to the extent a producer's production or sales are subsidized, its cost of production may be lessened).

In its brief, the defendant acknowledges that it is no longer Commerce's practice to deduct government subsidies from reported costs in calculating cost of production. In any case, the approach in these proceedings differs from the position taken here, that of reliance on the producers' costs as reflected in properly maintained books and records.[8] Thus, past administrative practice in antidumping cases supports neither side.

V. The Relationship between Antidumping and Countervailing Duty Law

The sources discussed thus far, even if viewed in toto, are not clearly dispositive of the issues involved in this case. To further substantiate their interpretations of section 773, the parties have presented additional practice considerations regarding the implementation of the antidumping statute. These arguments more clearly illustrate the propriety of defendant's interpretation.

[8] A House of Representatives report on the Trade Act of 1974 stated that, in calculating the cost of production, the Secretary will employ "accounting procedures generally accepted in the home market of exportation if he is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise." H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1973).

Plaintiffs argue that the antidumping law cannot possibly operate properly if subsidies are ignored in the calculation of foreign market value. In the case of Saarstahl, plaintiffs estimate that loans and grants have resulted in a subsidy impact of 11 percent of the value of sales. Plaintiffs further contend that Commerce's interpretation of section 773 has allowed Staarstahl to evade antidumping penalties simply by utilizing favorable accounting procedures. Plaintiffs argue that if all foreign manufacturers are allowed to record subsidies as reduced acquisition costs, rather than business receipts, the application of the antidumping law will be significantly curtailed.[9]

These arguments do not address the real question at issue: what is the scope of the antidumping law. Congress did not enact the antidumping statute to address all forms of interference in the international marketplace. Antidumping law seeks to counteract the comparative advantage held by foreign manufacturers who pursue inconsistent pricing policies in the international market in order to maximize their overall income. (Note that the domestic subsidies at issue presumably have the same result in both home and foreign markets.) The antidumping remedy protects domestic industry from imported merchandise sold at less than fair value, which imports either have caused or threaten to cause material injury. *Badger-Powhatan, Div. of Figgie Intern., Inc.* v. *United States,* 9 CIT——, 608 F. Supp. 653, 656–57 (1985). Countervailing duty law, in contrast, was enacted specifically to address the market distortions caused by subsidization. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 455–56 (1978). It is important to note that the amount of subsidies received by foreign manufacturers is not necessarily related to their disparate pricing practices at home and abroad. Subsidies can be applied to operations of an enterprise that do not have a direct impact on pricing, and prices can be raised or lowered regardless of the effects of subsidization. Thus, even if the impact of Saarstahl's subsidies was substantial and it avoided penalties solely through the election of favorable accounting procedures, plaintiffs' claim is still more properly addressed by countervailing duty law.

Defendant has persuasively argued that plaintiffs' reading of section 773 improperly blurs the distinction between antidumping and countervailing duty law. This court and its appellate court have long recognized the dangers of allowing these two areas of law to be commingled. See *supra* discussion of judicial precedent. In a recent case this court stated,

> [T]here are further reasons the court and the ITA should refrain from making a subsidy determination in the context of a

[9] Plaintiffs note that under the accounting laws of some nations, including West Germany, government grants may be treated as business receipts or used to reduce the cost of acquisition of a purchased asset. Plaintiffs contend that where grants are treated as business receipts in company records, the accounting entries on which cost of production is based reflect the actual economic cost of production. Where grants are used to reduce the cost of acquisition of a purchased asset, however, plaintiffs argue that cost of production calculations can be distorted as follows. The cost of producing a commodity will turn, in part, on the spent value (i.e., depreciation) of capital that is used to produce the item. If Commerce calculates depreciation based on the cost of acquisition as reduced by subsidization, the amount of depreciation assigned to cost of production in a given period will not reflect the true value of capital consumed.

dumping investigation. The determination of whether a countervailable subsidy exists is a complex one and Congress has provided a separate set of guidelines for the inquiry. In a dumping investigation the ITA is not seeking the same information or asking the same questions it would in a countervailing duty investigation. For this Court to disallow an adjustment to third country price because the import duty rebate is allegedly a countervailable subsidy would be to bypass the countervailing duty statute and essentially penalize the Taiwanese exporters without allowing them an opportunity at the agency level to have a full hearing on whether the rebates are a subsidy.

Huffy Corp. v. *United States,* 10 CIT——, 632 F. Supp. 50, 55–56 (1986).

Essentially, plaintiffs attack Saarstahl's accounting adjustment to fixed costs merely because the adjustment is based on subsidies. If plaintiffs' interpretation of section 773 prevailed in this case, Commerce would be allowed to counteract subsidization without undertaking any of the procedural protections contained in the countervailing duty statute. Under countervailing duty law a subsidy may result in the imposition of duties only if it falls within the term "subsidy" as defined in 19 U.S.C. § 1677(5) (1982). Furthermore, some government grants, such as those which are generally available, are not countervailable. *But see, Cabot Corporation* v. *United States,* 9 CIT——, 620 F. Supp. 722 (1985), *appeal dismissed on other grounds,* No. 86–729 (Fed. Cir. April 9, 1986). Plaintiffs' interpretation of section 773 dispenses with these inquiries and threatens to create a new body of law with different criteria for identifying and valuing subsidies. Benefits that were previously not countervailable could be attacked under new antidumping rules, thus creating substantial uncertainty among exporters.

Utilizing producers' records of cost of production, kept in accordance with generally accepted local accounting procedures, which procedures reasonably reflect fixed and variable costs, allows Commerce to administer the antidumping laws without undertaking an unauthorized countervailing duty investigation. For these reasons, this court cannot conclude that the defendant's construction of section 773 is unreasonable.

(Slip Op. 86–125)

DAEWOO ELECTRONICS CO., LTD., ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 85–01–00140

Before WATSON, *Judge.*

[Motion to compel disclosure granted. Motion for sanctions denied.]

DISCLOSURE OF ELECTRONICALLY STORED DATA USED IN ADMINISTRATIVE PROCEEDING

Under an order requiring disclosure of computer tapes, the government is compelled to provide the defendant-intervenor with electronically stored data used in arriving at the administrative determination under review, and to do so in the form of sequential files. A variety of deficiencies in prior disclosure by the government are found to be excusable and sanctions are not imposed.

(Decided December 2, 1986)

Frederick L. Ikenson, P.C. (Frederick L. Ihenson and *J. Eric Nissley* for defendant-intervenor Zenith Electronics Corporation.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(J. Kevin Horgan,)* attorney for the defendants.

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* This opinion decides contested motions to compel discovery and for sanctions in a judicial review of the final results of the Department of Commerce's review of the antidumping duty order covering color television sets from Korea.

This controversy is a good example of how the development of new technology for using, storing and transmitting information allows parties to test the rules of disclosure or discovery. It also teaches the important lesson that if these new developments are not treated with common sense and fairness they may become a threat to the meaningfulness of judicial review.

On August 8, 1985 the court ordered the Department of Commerce ("Commerce") to provide the Zenith Electronic Corporation ("Zenith"), a defendant intervenor, with copies of the computer tapes submitted to, or used by it, in arriving at the final results of the administrative review. Zenith has now moved for an order compelling production of computer programs, data sets and related technical aids as well as for sanctions for earlier failures to comply by the Commerce Department. From the motion papers, which were thorough and which eliminated the need for oral argument, the court has learned of the difficulties which led to this motion and of the narrowing of the dispute in the course of this motion.

Following the initial order of the court directing disclosure, three areas of difficulty arose. First, on three occasions, Commerce provided Zenith with computer tapes containing information recorded at a density much greater than was stated by Commerce. This was roughly analogous to sending information on a microdot to someone who was only equipped to read a postcard.

Second, after going to additional expense to transform the tape to a usable density, Zenith found that data for home market sales of two companies was not included. Commerce then located the missing tapes and supplied them to Zenith.

Third, Commerce refused to provide material known as SAS data sets, unless the original order was amended to specifically include them. The SAS data sets are the final refined forms of the data on the original computer tapes, extracted by Commerce from the sub-

mitted tapes, stored as electronic data in a main frame computer at the National Institute of Health (NIH), and used in arriving at Commerce's final results. As this facet of the dispute developed in the motion papers two points became clear: First, Commerce had destroyed the information needed to recreate the SAS data sets from the raw data tapes.[1] This left the SAS sets themselves as the only source of the actual data used by Commerce in generating its final results. Second, for Zenith to receive the SAS sets on its smaller computer (even after having to obtain a license to use the SAS program, since it is copyrighted by a private company) the SAS data would have to be put into a form known as sequential data files.

At the end of this phase of the dispute Commerce insists that the SAS data sets are not covered by the original order, although it does not object to disclosure by an amended order. In addition, Commerce objects completely to transferring the SAS data sets in the format of sequential files, claiming that this would be tantamount to requiring them to generate material not used in the administrative review and would further be unduly burdensome and impair its ability to function in general.

In this decision the court grants Zenith's motion to compel the production of the SAS data sets in the form of sequential files. The basis of this ruling is the court's opinion that its orders with respect to disclosure of the administrative record should be construed liberally and should not be impeded by excessively technical objections. As to Zenith's motion for sanctions, the court finds that sanctions should not be imposed on the government for conduct in the early stages of adjusting to new technical procedures even though the conduct may contain elements of negligence or gamesmanship. This is done primarily to protect the greater good of allowing parties to truly test the limits when laws or rules are applied in new circumstances.

On the question of the repeated failure of Commerce to supply tapes with the proper density the court accepts the government's explanation that it did not learn how to do this until its fourth attempt. At that point Commerce discovered that a special overriding instruction was needed in order to induce the NIH computer to produce tapes with the correct density. Prior to that, the computer apparently gave the appearance of complying with the desired result but, in obedience to some embedded command, continued to produce tape with a high density.

On the subject of the missing tapes, the failure to include them and the delay in locating them is forgiven as an unintentional consequence of labeling and record keeping difficulties in the early stage.

The court is more troubled by indications that Commerce took an inordinately restrictive view of its obligations under the order.

[1] The court notes that even if the information about how Commerce transformed the raw data into the final data on the SAS sets had survived, it is doubtful that the court would restrict a party to the information needed to duplicate that process, rather than to gaining access to the final data sets.

While there is undoubtedly an adversarial nature to these proceedings, the area of disclosure of the components of the administrative action is not where the extremes of adversarial technique ought to be displayed.

Traditional pretrial discovery and the disclosure of administrative records are, at the very least, equivalent procedures. *Jernberg Forgings Co.* v. *United States,* 8 CIT 275, 277 n.3, 598 F. Supp. 390, 392 n.3 (1984). If anything, the duties of a party with respect to turning over the contents of an administrative record are more certain than the obligations of ordinary discovery. The administrative record is the explicit subject of a statutory mandate, the unique object of judicial review, and a matter of known importance at all times. *See,* 19 U.S.C. § 1516a (b)(2).

The court ordered the government to turn over the computer tapes used in the administrative proceeding. The government took the most literal possible reading, saying that it meant only reels of tape and not the distillation of that data which resides in the further refined form of electronic impulses in the NIH computer. This could be taken for sophistry and obstructiveness. To say that the data sets into which the computer tapes were transferred are not governed by an order speaking of computer tapes is as if someone had said at the dawn of the era of typewriters that typed documents are not governed by a court order speaking of "writings." This sort of conduct led to sanctions for a defendant which argued that it could not comply with a request for its "ledgers and journals" because its business records were computerized and available only in a "codified computer printout." *Emerick* v. *Fenick Industries, Inc.,* 539 F. 2d 1379 (5th Cir. 1976).

This court, in its original order, used "computer tapes" to mean all forms of data which are uniquely subject to manipulation by computers, i.e., those forms that are electronic records. If this was technically imprecise, then Commerce has taken unfair advantage of the court's lack of familiarity with the variety of further electronic refinements and embodiments of taped information.

It would be a dangerous development in the law if new techniques for easing the use of information become a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle that information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms. This is within the plain contemplation of CIT Rule 34. It is also in consonance with Rule 34 of the Federal Rules of Civil Procedure, and the revision comments of the Advisory Committee which indicate that the rule is intended to keep pace with changing technology. *See* 48 F.R.D. 487, 527 (1970). It follows that court orders to disclose computer tapes used in the administrative proceeding should be understood to include disclosure of all further refined forms of electronic storage of the data involved.

In addition to the government's restrictive view of its basic obligation under the disclosure order, the government also objects to Zenith's request that the data be transmitted in the form of sequential data files.

It appears to the court that the placing of this data into sequential files is comparable to the normal ordering of files which would have to be done by the respondent in routine discovery of documents. The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship. The government has made no such showing. Similarly, a normal and reasonable degree of direct communication and assistance to the discovering party is the unavoidable burden of the respondent, in the absence of a showing of extraordinary hardship. The government has made no such showing. This court is not requiring the government to create something new or to render exceptional assistance. It is simply requiring that an existing body of data be transmitted in a reasonably usable way with a modicum of cooperation.

This view is supported by the Manual for Complex Litigation, *See*, § 2.715 (4th ed. 1979). The disclosure ordered here does not go nearly as far as a type of electronic data disclosure which was ordered in *National Union Elec. Co.* v. *Matsushita Elec. Industry Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980).

In concluding, the court notes that the government's attitude towards its obligation to transmit information and the characterization of that duty as an interference with, or unwarranted burden on normal administrative operation, has the potential to create very serious problems. It raises the specter of a society in which decisions may be unexaminable because they are accomplished by electronic means too complex and unique to be transmitted in a comprehensible way even to those citizens sufficiently knowledgeable to analyze the relevant data. In this cybernetic new world the effort needed to transmit and explain the basis for the decisions would interfere with the making of other decisions, so that all functioning comes to depend on insulation from critical examination.

This is the logical end of the position taken by the government and this is the reason why it must be rejected. Although efficiency is a desirable goal of government, it does not justify a diminution of basic rights which are crucial to the operation of judicial review. *Youngstown Sheet & Tube Co. et al.* v. *Sawyer*, 343 U.S. 579, 629 (1951).

For the reasons expressed above it is hereby

ORDERED, ADJUDGED, AND DECREED that the Department of Commerce shall

1. Provide to Zenith's counsel all computerized data consisting of so-called SAS data sets used by said Department in calculating the final results of the administrative review under challenge herein,

such data sets to be transferred to Zenith's counsel in the form of sequential data files recorded on magnetic tape, together with the instructions (also recorded on magnetic tape) used to prepare such files;

2. Provide to Zenith's counsel machine-readable copies, recorded on magnetic tape, of the SAS computer programs used to generate the final results; and

3. Render to Zenith's counsel such cooperation and reasonable assistance as is necessary to enable them to process the computerized data, including, but not necessarily limited to, conferring with Zenith's counsel and automated data processing ("ADP") expert.

In all other respects, including the motion for sanctions and the motion for oral argument, the motions are denied.

(Slip Op. 86–126)

UNITED STATES OF AMERICA, PLAINTIFF *v.* F.H. FENDERSON, INC., DEFENDANT

Court No. 84–07–01008

Before CARMAN, *Judge*

[Plaintiff's motion for summary judgment denied. Defendant's cross-motion for summary judgment denied.]

(Decided December 5, 1986.)

Richard K. Willard, Assistant Attorney General; David M. Cohen, Director, Department of Justice, Commercial Litigation Branch, Civil Division *(Platte B. Moring, III)* for plaintiff.

Doherty and Melahn (William E. Melahn) for defendant.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* The United States (Government) commences this action against defendant F. H. Fenderson, Inc. (Fenderson) to recover a civil penalty for an alleged negligent violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982). The complaint alleges the defendant, as importer of record, negligently entered, introduced, or caused to enter or introduce a series of entries of merchandise (crabmeat) from Canada into the commerce of the United States by means of false documents that incorrectly stated the dutiable values for the merchandise. These improper statements resulted in a potential loss of revenue in the amount of $834.08.

Government moves under Rule 56 of this Court for summary judgment on the grounds there are no genuine issues of material fact as to the case. Fenderson opposes Government's motion and contends there are genuine issues of material fact in dispute. Fenderson cross-moves for summary judgment on the same grounds as Government's motion and contends Government, through its Customs branch, is attempting to illegally assess multiple penalties for

the same alleged violation of 19 U.S.C. § 1592, has failed to follow its own regulations with respect to voluntary disclosure, and has violated Fenderson's rights under 19 U.S.C. § 1618 by refusing to accept a second supplemental petition. Based upon the following discussion, Government's motion for summary judgment is denied, and Fenderson's cross-motion for summary judgment is also denied.

UNCONTROVERTED FACTS

The following facts are not in dispute:

From approximately May 1981, to and including September 1981, the defendant, F. H. Fenderson, a customhouse broker, as importer of record, entered, introduced, or caused to enter or introduce merchandise (crabmeat) from Canada into the Commerce of the United States at the Port of Calais, Maine. Fenderson as importer of record filed seven consumption entries on behalf of Landry & Landry, an exporter, utilizing documents supplied by Landry & Landry. On each of the pro forma invoices accompanying the seven entries in question, the Canadian exporter certified the "currency of value" was Canadian. On each of the Special Customs invoices accompanying the entries in question, the Canadian exporter stated the invoice price for the merchandise involved and certified Canadian currency was used. Fenderson, as customhouse broker, relied on these certified forms in filing the entries on behalf of the exporter, and, as importer of record, converted the invoiced amount to an equivalent amount in United States dollars.

Government claims the entries and other documents were false in that they stated incorrect dutiable values of the merchandise. The invoices submitted with the entries indicated the transactions were in Canadian money, when, in fact, Government argues, payment for the transactions was made in the amount shown on the invoice but in United States currency. Government contends this conversion from Canadian dollars to United States dollars was a negligent act by Fenderson which resulted in a potential loss of revenue in the amount of $834.08.

On September 30, 1981 the District Director at Portland, Maine sent a Prepenalty Notice, covering 12 entries, to Landry & Landry, the exporter of the merchandise and the preparer of the invoices. These 12 entries included the seven entries which are at issue in this case. On October 21, 1981, Landry & Landry responded to the Prepenalty Notice and sent a check for $1,657.73 drawn on a Canadian bank. The check was returned two days later because it was not drawn on a United States Bank.

By memorandum dated November 3, 1981, Fenderson tendered its check for $1,657.73 as a "Voluntary Tender" on behalf of Landry & Landry; a receipt dated November 5, 1981 was issued by Customs. Notice of Penalty in the amount of $6,630.32 was issued to Landry & Landry on November 4, 1981, and Landry & Landry petitioned for relief by letter dated November 24, 1981. A decision was issued

to Landry & Landry's attorney on January 18, 1982 with a finding of gross negligence but mitigating the penalty to $3,315.46. This amount was forwarded to Customs by memoranda dated March 4, 1982, and Customs issued a receipt.

A Prepenalty Notice covering seven of the same entries as involved the Landry & Landry penalty was sent to Fenderson. The response was filed by Fenderson on October 26, 1982. A Penalty Notice in the amount of $1,668.16 was issued to Fenderson on November 6, 1981 with a culpability determination of negligence. Fenderson filed a petition on January 3, 1982, and a decision was made on January 11, 1982 reducing the penalty to $250.00 in accordance with the guidelines in the Fines, Penalties and Forfeitures Handbook as it relates to brokers. Additional information in the form of a supplemental petition dated February 7, 1982 was filed with Customs, and a response dated February 9, 1983 from the Regional Commissioner was transmitted through the District Director to Fenderson on February 18, 1983.

Based on these communications and transactions among Customs, Fenderson, and Landry & Landry, Fenderson argues Government, through its Customs branch, is illegally assessing multiple penalties; has failed to follow its own regulations; and has violated Fenderson's rights in refusing to accept the second supplemental petition.

DISCUSSION

The Court of Appeals for the Federal Circuit has set forth the standards this Court must utilize in determining a summary judgment question as follows:

> [S]ummary judgment under Rule 56, Fed. R. Civ. P., is entirely appropriate * * * where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. * * * The movant bears the burden of demonstrating absence of all genuine issues of material fact, * * * the * * * court must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in its favor, * * * and must resolve all doubt over factual issues in favor of the party opposing summary judgment.* * *

SRI International v. *Matsushita Electric Corporation of America*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (citations and footnotes omitted). This Court recognizes: "[it] would be manifestly unfair and violative of due process to deprive [a party] of its day in court where basic factual issues require resolution." *Yamaha International Corp.* v. *United States*, 3 C.I.T. 108 (1982).

As an initial matter, Government has submitted its motion for summary judgment supported by documents referred to as Copp's Deposition Exhibits. Rule 56(f), Rules of the Court of International Trade sets forth, in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would

be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mr. Copp has been referred to as an Assistant District Director of the Customs Portland Office in some of the supporting papers submitted in this case, but not in any affidavit, and certainly not in any manner which explains his competency to testify. There has not been submitted any documentation or explanation as to the basis of whose knowledge these documents truly exist. We find no facts that would be admissible in evidence to show Copp competent to testify in these matters or to show the admissibility of these documents. A lack of documentation and explanation as to the basis of an affiant's knowledge will constitute a fatal defect on the face of the motion. *Fortune Star Products* v. *United States*, 78 Cust. Ct. 184, C.R.D. 77–3 (1977).

Of more immediate concern to this Court regarding the motion for summary judgment, notwithstanding these defective documents, is that Fenderson has submitted information which raises material issues of fact which will require resolution upon a trial on the merits. Our attention is specifically drawn to Fenderson's challenge to the charge of negligence. Where a genuine issue of material fact on the question of negligence has been raised by an opponent of a motion for summary judgment, the motion will be denied. *United States* v. *Rockwell International Corp.*, 628 F.Supp. 206 (C.I.T. 1986).

Although some of Government's arguments may be valid on the merits, it is not for this Court to pick and choose the merits on a general motion for summary judgment:

> "Fact finding and not fact determination is the fundamental issue confronting the court on summary judgment motions. Thus, the court cannot try issues of fact on a summary judgment motion, it can only determine whether there are factual issues to be tried. * * * If a party opposing summary judgment raises any triable fact questions, he has the right to adduce the expert testimony of live witnesses and cross-examine his opponent's witnesses rather than have to rely on the affidavits submitted in opposition to the summary judgment motion.

Yamaha, 3 C.I.T. at 109.

Fenderson cross-moves for summary judgment on this case focusing on a different area of the facts. Government opposes this motion. This Court is under no duty to grant a motion for summary judgment merely because both parties contend there are no factual issues to be tried. *Shell Oil Co.* v. *United States*, 84 Cust. Ct. 255, C.R.D. 80–4 (1980). *See also Carter Footwear* v. *United States*, —— C.I.T. ——, Slip Op. 86–95 (Sept. 19, 1986). The parties disagree upon which facts are in dispute. This Court, upon examination of the documents and statements submitted, also finds in this instance, as well as in other areas in this case, there are genuine issues of fact in dispute.

It has been held:

> Though speedy and inexpensive, summary judgment is nonetheless a 'lethal weapon' capable of 'overkill'. * * * It denies the non-movant its 'day', i.e. a trial, in court. Moreover, experience has shown that a trial often establishes facts and inferences not gleanable from papers submitted [sic] pre-trial. Further, a reversal of summary judgment on appeal is not dispositive, but merely remits the case for trial. If reversal be error, that error will manifest itself at [sic] close of the non-movant's case, when the * * * court may direct a verdict or enter judgment accordingly.

SRI International, 775 F.2d at 1116–1117.

With these precautions in mind, this Court has decided to deny both parties' motions for summary judgment.

So Ordered.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/199	Tsoucalas, J. November 14, 1986	Ex-Cell-O Corp.	83-5-00670	Item 661.06 6.4% or 6.1% Item 661.12 4.2%	Item 660.73 Free of duty	Agreed statement of facts	New York Parts of non-piston type internal conbustion engines
C86/200	Tsoucalas, J. November 14, 1986	Novatronics of Canada, Ltd.	84-10-01381	Item 682.25 9.6%	Item 682.30 5.1%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/201	Tsoucalas, J. November 14, 1986	Novatronics of Canada, Ltd.	85-3-00396	Item 682.25 8.8%	Item 682.30 4.9%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/202	Tsoucalas, J. November 14, 1986	Novatronics of Canada, Ltd.	85-3-00397	Item 682.25 8.8%	Item 682.30 4.9%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/203	Tsoucalas, J. November 14, 1986	Novatronics of Canada, Ltd.	85-3-00398	Item 682.25 8.8%	Item 682.30 4.9%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/204	Newman, S.J. November 14, 1986	Novatronics of Canada, Ltd.	81-12-01715	Item 682.25 12.5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/205	Newman, S.J. November 14, 1986	Novatronics of Canada, Ltd.	81-12-01717	Item 682.25 12.5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
C86/206	Newman, S.J. November 14, 1986	C.J. Tower & Sons of Buffalo, Inc.	83-8-01139	Item 682.25 10.3%	Item 682.30 5.3%	Agreed statement of facts	Detroit Motors
C86/207	DiCarlo, J. November 20, 1986	K Mart Corp.	85-8-01143	Schedule 3, Part 6, Subpart F	Item 376.56 13.5%	Inod Outerwear v. U.S., S.O.85-72	New York Wearing apparel

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and rate	Item No. and rate		
C86/208	Tsoucalas, J. November 21, 1986	Allis-Chalmers Corp.	85-2-00273	Item 727.06 3.6%	Item 666.00 Free of duty	Agreed statement of facts	Kansas City Driver Seats
C86/209	Tsoucalas, J. November 25, 1986	Infrared Engineering, Inc.	85-6-00816	Item 712.05 15.6%	Item 712.49 6.8%	Agreed statement of facts	Boston Infragauges and parts thereof
C86/210	Tsoucalas, J. November 26, 1986	Madison Watch Co.	85-11-01609	Item 688.36 or 688.45 4.9% for electronic digital watches Item 740.35 27.1% for bands Item 791.54 5.4 for straps	Item 688.36 4.9% for fittings only (bands and straps)	U.S. Texas Instruments Inc., 673 F.2d 1375 (1982)	New York Fittings
C86/211	Tsoucalas, J. November 26, 1986	Infrared Engineering, Inc.	84-12-01739	Item 712.05 21.3%, 19.4%, 17.5% or 15	Item 712.49 8.7%, 8.1%, 7.5%, 6.8%	Agreed statement of facts	Boston Infragauges and parts thereof
C86/212	Tsoucalas, J. November 26, 1986	Teleflora Products	85-6-00753	Item 206.98 5.1%	Item A207.00 Free of duty	Agreed statement of facts	Los Angeles Birdhouses

ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/275	Restani, J. November 17, 1986	International Seaway Trading Corp.	83-7-01025	Export value	4.80 per pair, packed	Samuel Brilliant Co. v. U.S., S.O. 85-41	Miami Footwear
V86/276	Watson, J. November 18, 1986	Argonne Electronics Mfg. Corp.	R59/3308, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/277	Watson, J. November 18, 1986	Argonne Electronics Mfg. Corp.	R59/7553, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
V86/278	Watson, J. November 18, 1986	International Expediters, Inc.	R70/8227, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Chicago T.V. sets
V86/279	Watson, J. November 18, 1986	Mamiye Bros.	240146A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Cotton hooked rugs, etc.
V86/280	Watson, J. November 18, 1986	Mitaui & Co.	R64/19488	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles Sewing machine heads
V86/281	Watson, J. November 18, 1986	William A. Rogers	R63/4676, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
V86/282	Watson, J. November 18, 1986	Trans-Ocean Import Co.	R60/14509, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Boston Rugs

ABSTRACTED VALUATION DECISIONS — Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V86/283	Watson, J. November 18, 1986	Trans-Ocean Imports Co.	R61/15156, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Wilmington Rugs
V86/284	Watson, J. November 18, 1986	Trans-Ocean Import Co.	R62/6668, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New Orleans Rugs
V86/285	DiCarlo, J. November 20, 1986	Carlyle Footwear	80-9-01403	American selling price	Appraised values less 22% per pair	Agreed statement of facts	Los Angeles Footwear
V86/286	DiCarlo, J. November 20, 1986	Mitsubishi Internationa. Corp.	82-11-01595, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	New York Footwear
V86/287	DiCarlo, J. November 20, 1986	Mitsubishi International Corp.	83-2-00297, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Savannah Footwear
V86/288	DiCarlo, J. November 21, 1986	Mitsubishi International Corp.	83-7-01065, etc.	American selling price	Appraised values less 22%, per pair	Agreed statement of facts	Norfolk Footwear

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